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Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x

4 FEDERAL HOUSING FINANCE AGENCY,

5 Plaintiff,

6 v.

7 UBS AMERICAS INC., et al.,

8 Defendants,

9 and other FHFA cases.

10 -----x

11 Civ. 5201 (DLC)
11 Civ. 6188 (DLC)
11 Civ. 6189 (DLC)
11 Civ. 6190 (DLC)
11 Civ. 6192 (DLC)
11 Civ. 6193 (DLC)
11 Civ. 6195 (DLC)
11 Civ. 6196 (DLC)
11 Civ. 6198 (DLC)
11 Civ. 6200 (DLC)
11 Civ. 6201 (DLC)
11 Civ. 6202 (DLC)
11 Civ. 6203 (DLC)
11 Civ. 6739 (DLC)
11 Civ. 7010 (DLC)
11 Civ. 7048 (DLC)

11 New York, N.Y.

12 July 31, 2012

13 3:00 p.m.

14 Before:

15 HON. DENISE COTE

16 District Judge

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1 (Case called)

2 THE COURT: Thank you, everyone. Appreciate your
3 appearance here today. We have a number of matters to address.
4 So let me list the issues that I am aware of. We're going to
5 talk about a schedule for expert discovery, what I'll refer to
6 at this stage for expert discovery. We're going to talk about
7 discovery of the plaintiff and its constituent entities beyond
8 the PLS divisions or branches within those agencies.

9 I am going to ask Ms. Shane for a status report on how
10 we're doing with predictive codeine. I am hoping that a meet
11 and confer process has resolved any disputes concerning
12 discovery related to ResCap, but we'll see.

13 I know I have been given two documents. I haven't had
14 a chance to look at them. I want to say my two page letter
15 limit had a good impact on attorney's time but has failed
16 adequately to address the paralegal time issues but I made a
17 good stab at getting through materials. I am not sure I've
18 focused on precisely the passages you wanted me to but I've
19 looked at a lot of material you've submitted. And counsel, of
20 course, may have other issues they want to address today as
21 well.

22 I have good news and bad news for everybody. So
23 depending on the issue, you will be happy or disappointed. So
24 maybe I'll just start with some preliminary rulings on an issue
25 and then give a chance to the disappointed parties to be heard

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1 and, if necessary, we'll have a more extensive discussion.

2 Why don't I start by disappointing FHFA and I'll move
3 on to the defendants.

4 So let's talk about the staging of expert discovery.
5 At our June 13 conference at page 14 I briefly outlined how I
6 thought disclosures might proceed. Based on the materials that
7 had been presented to me in advance of that conference which I
8 noted at the time were very helpful to me, I came to the
9 conclusions that the defendants would not agree to restricting
10 discovery in this case to a sample of loan files. And that,
11 indeed, the plaintiff wanted to reserve its rights as well
12 potentially as affirmative defenses were played out to look
13 beyond any initially designated sample of loan files.

14 So as much as I was disappointed by that conclusion I
15 shared that with you all on June 13th and outlined how I
16 thought we might proceed with respect to expert discovery. And
17 I know that the plaintiff is already on its way to making
18 disclosures of samples and individual cases and it began that
19 in the UBS case because that's our first tranche trial.

20 And I think the defendants are right that the next
21 thing that has to happen is for the plaintiff to make a
22 disclosure of how it feels the misrepresentations and one, two
23 or all three categories are playing out when you look at that
24 sample.

25 And then the next stage would be for the defendants to

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1 respond and it's possible that defendants will respond with a
2 disagreement about the content of the plaintiff's sample and
3 it's analysis of the extent to which misrepresentations appear
4 in that sample or they may do their own sample of a larger or I
5 suppose potentially smaller or just an intersecting group,
6 different sample all together or they might not do any sample
7 and that may change from case to case.

8 It may change from misrepresentation to
9 misrepresentation. And I don't think that's something I could
10 control or would seek to control even if I could. And I feel
11 as if the plaintiff wants to use this request to require the
12 defendants to disclose a sample before they know what the
13 plaintiff's position is with respect to the misrepresentations
14 and the extent to which misrepresentations appear in the
15 plaintiff sample.

16 It's sort of way of managing discovery and of managing
17 the litigation and that had been my hope but as I explained on
18 June 13th I don't think that is going to fly for all the
19 reasons I described then. So I think what we're left with is
20 setting out a schedule, hopefully, one that we could agree to
21 in the UBS case and that could be used as a model for the other
22 tranches. So I am not saying that -- it would just be a model.
23 The parties would have an opportunity to agree or disagree in a
24 particular case that the model worked. But so I think what
25 should happen is what has already begun in the UBS case and

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1 that is the plaintiff has identified -- I think was last Friday
2 the 27th of July -- the sample it's going to use in the UBS
3 case. It's made a commitment to identify the extent and nature
4 of the breaches within that sample to UBS within 45 days of
5 getting custody, complete custody of the loan files as I
6 understand it. Counsel will be able to correct me to the
7 extent I've misunderstood anything. And then there's a period
8 of time after that and I know the defendants asked for 90 days
9 but I think we're going to have to talk about that for a bit,
10 for the defendants to respond with their own expert analysis
11 which could take any number of forms. If the defendants are
12 going to use their own different sample I think their response
13 would have to identify that along with their analysis of what
14 that sample showed or didn't show.

15 If the defendants were going to instead just attack
16 the plaintiff's sample and its conclusions in that analysis,
17 then that's what it would have to do and then the plaintiff
18 would have a chance to reply. It could change its sample,
19 broaden it, respond in any number of ways that seemed
20 appropriate and that's when the issues would be joined.

21 The plaintiff suggests that it might be useful to have
22 Daubert motion practice at this stage. If we did do that all
23 we'd have is a Daubert motion addressed to the methodology the
24 plaintiff used to create its sample. I don't know if the
25 plaintiff wants that, given what I am outlining. Because it

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1 had envisioned Daubert practice addressed to sampling
2 protocols.

3 I, personally, think it might be useful for everyone
4 to have a statement of how I would read a Daubert challenge to
5 the plaintiff's sampling protocol in the UBS case and I think
6 it would be useful for all of us to have that statement of the
7 law and analysis as we move forward. But, and folks may prove
8 me wrong here, I sort of think it unlikely that any methodology
9 is ultimately going to be rejected by a Daubert analysis. I
10 think what will probably happen is that the lines of attack
11 will be more clearly fleshed out through such motion practice.
12 And it may inform the development of different sampling
13 protocols by both the plaintiff and the defendants as we move
14 forward. Even though I am not sure the motion could be
15 granted, I am happy to receive such a motion if the parties
16 think it would be useful.

17 I am interested in learning what the state of play is
18 with respect to production of the loan files. I had assumed
19 that they would have been produced by now or largely produced
20 by now. I thought we were engaged in an effort to get the
21 ResCap files which had its own separate issues.

22 So, I don't know, Mr. Selendy, I know you have been
23 anxious to speak. I don't know if you want to speak or you
24 want Ms. Chung to address this issue.

25 MR. SELENDY: I would be glad to address this issue,

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1 your Honor. And let me begin by saying we are committed to
2 having a disciplined, efficient and rigorous process to deal
3 with sample and re-underwriting. But there is a fundamental
4 problem that we have with the schedule that you've proposed and
5 I think it goes in part to your belief that FHFA had accepted
6 what was, in fact, a UBS proposal that we think is impossible
7 to meet. And if I could step back a little bit --

8 THE COURT: I don't think you accepted any UBS
9 proposal.

10 MR. SELENDY: Just to be clear about it, when we talk
11 about the sampling, that is something that can be set forth on
12 a basis regardless of any results, obviously, of the
13 re-underwriting exercise. That's a statistical matter. It can
14 be done on a clear methodology with well-settled guidelines and
15 we, therefore, propose in a movement that, actually, went
16 significantly toward the defendants. We proposed a broader set
17 of samples which would allow extrapolation on a deal by deal
18 basis at a 95 percent confidence interval with a margin of
19 error of plus or minus ten percent.

20 In order to come up with a sample we did require the
21 loan tapes. And just to refresh your Honor's recollection, the
22 loan tapes are the disclosed characteristics of loans and
23 borrowers that are essentially equivalent to the mortgage loan
24 schedule as part of the prospectus supplement. It is the basis
25 on which the underwriters and sponsors are making

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1 representations and warranties about the loans in each
2 portfolio.

3 The loan tapes are very different than the loan files.
4 The files contain the application, plus the work product of the
5 loan underwriters as they attempt to assess whether the loan is
6 consistent or not with the underwriting guidelines and then
7 state the various attributes of loan borrower which,
8 ultimately, end up in the loan tapes.

9 The process of choosing a sample is relatively
10 efficient as we've previously informed your Honor. That can be
11 done in a matter of weeks. Once we have the loan tapes and,
12 indeed, we've provided, as you mentioned, a sample for the UBS
13 case which is completely random. It's a random sample across
14 the securitizations in that case that stratifies according to
15 FICO scores. So the purpose of stratification is to increase
16 the precision of the estimate and reduce the margin of error.
17 It's still a 95 percent confidence interval but it's better
18 than a pure random sample.

19 The truly laborious part of this work, however, is not
20 in the sampling but in the re-underwriting exercise that is,
21 essentially, taking each one of the loan filings which
22 defendant previously represented to be, approximately, 300
23 pages per file and going through that. And it's not just to
24 test whether the data in the loan file is correctly described
25 in the loan tape but it's also to test whether the

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1 representations in the application are truthful, whether the
2 appraised value is as represented, if the appraised value is
3 false, the loan devalue ratio will be false, whether, in fact,
4 it's a primary residence or not. If it's not a primary
5 residence the owner occupancy ratios may be false. Whether the
6 loan and borrower characteristics comply not only with the
7 stated fines but also with federal law and regulation, there
8 are compliance requirements and other requirements. Indeed,
9 there is a check list of probably more than 50 attributes for
10 every single loan that needs to be tested and that is the truly
11 burdensome part of the exercise.

12 As you may recall, the proposed sample initially put
13 forward by defendant UBS would have involved re-underwriting,
14 approximately, 50 or 55 percent of the entire population. A
15 totally unworkable proposal.

16 We have proposed various ways of designing a sample
17 that would still give the Court confidence in the results and
18 in any extrapolation but would significantly reduce the
19 numbers. Our current proposal for UBS if applied across all
20 securitizations would be, approximately, \$44,900. The maximum
21 capacity that we have currently would be to review,
22 approximately, four to five thousand loans per month but that's
23 just the review. We also need in order to develop a
24 particularized assessment of breach on a loan by loan basis we
25 need the guidelines. We need to map the guidelines and the

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1 reps and warranties in every single securitization so that when
2 the loans are re-underwritten we can test for each loan in the
3 sample whether or not the loan is eligible, whether or not the
4 representations and warranties have been truthfully made or if
5 instead they are materially in error.

6 And then we need to aggregate the results of that
7 assessment, have our testifying expert review them across the
8 entire population and combine them into a report. So the
9 proposal to come forward with a -- the results on a
10 particularized basis loan by loan is nothing less than a
11 proposal to present our final expert report on re-underwriting.
12 And we have already been working with the Court's very
13 accelerated service discovery schedule for document discovery.
14 If we were to produce that now it's, essentially, saying that
15 rather than the June 2013 date for expert disclosures on
16 re-underwriting we would need to produce that within 45 days
17 and that's simply not possible, your Honor.

18 THE COURT: Let me ask you about two numbers. I just
19 want to make sure I've captured them correctly.

20 MR. SELENDY: Yes.

21 THE COURT: For the UBS sample, are you saying that
22 your sample resulted in a selection of 44,000, roughly, loans?

23 MR. SELENDY: No. That's across all of the
24 securitizations in all of the cases. We have, approximately, a
25 million loan files across all of the cases before your Honor.

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1 And if we use our sampling method we can bring that sample down
2 to 44,900. In the UBS case that would be, approximately, 2200
3 loans. And our belief is that once we actually get production
4 of loan files -- and I'll note that FHFA has produced more of
5 the UBS loan files to UBS than we've received from UBS to date.
6 Once we actually get the loan files and the guidelines, we then
7 need to do the mapping exercise, build the protocol for the
8 re-underwriting and assuming the sample is acceptable we can
9 re-underwrite those 2200 loans for the UBS case.

10 My best estimate right now is that we could complete
11 that in, approximately, four months. We're working to shorten
12 the time for re-underwriting but the reason that we sought to
13 stage this so we had either an agreement with defendants as is
14 common in many cases --

15 THE COURT: You won't get one here.

16 MR. SELENDY: I understand that. Or whatever
17 challenges. We don't know, frankly, the basis of defendant's
18 objections, whether they're opposed to idea of sampling, if
19 they have particular problems or not, we don't know what those
20 issues are. We had thought if there were legitimate issues
21 they should be framed up on an early basis for the Court to
22 consider and for us to address it so that before the tremendous
23 expense of re-underwriting is undertaken we can at least have
24 the mathematical issues of the sample resolved.

25 THE COURT: So you want the Daubert motion.

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1 MR. SELENDY: Frankly, your Honor, we that I think
2 that the proposal that we suggest for sampling is
3 incontestable. But if there are objections we think they
4 should be framed early before the re-underwriting exercise is
5 undertaken so that no one wastes time and money re-underwriting
6 loan files that either may be outside the samples or if the
7 sample size is not big enough, let's resolve that first and
8 then we can put the huge teams to work in actually going
9 through the loan files. The sampling exercise, in other words,
10 is a much simpler mathematical exercise. The re-underwriting
11 exercise is very complicated and, indeed, involves going
12 through all those loans.

13 I have to say, your Honor, there is more than a little
14 irony here in defendant's trying to force us to a 45 day period
15 to re-underwrite 2200 loans because the entire reason we're
16 here, we submit, the entire reason is that we had this reckless
17 dramatic origination of loans and systematic disregard of
18 guidelines at an incredible pace, rather than the proper
19 re-underwriting according to guidelines. And we do not propose
20 to do as defendants did when they first originated the loans.
21 We want to re-underwrite these responsibly and present them in
22 the context of an expert report, as we do in other cases.

23 THE COURT: I had thought when I had those submissions
24 before the June conference that your expert wanted to at least
25 consider a different sampling methodology for different cases

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1 depending on the characteristics of the securitizations.

2 MR. SELENDY: Yes. Your Honor, the issue there is
3 that for certain of the cases, specifically the Tranche Two
4 cases, JP Morgan and Merrill, the volume is very high. In
5 terms of the number of securitizations and our expert wanted to
6 be able to frame up a further efficiency measure whether it's
7 clustering or some other form of aggregating deals with the
8 same underwriter, the same originator and the same vintage so
9 that you could develop results for a cluster of deals within
10 the sample. That issue only arises in these cases where we
11 have such a huge volume. For most of the cases they will be
12 like UBS. And we're prepared do the re-underwriting on a
13 securitization by a securitization basis at a 95 percent
14 confidence interval, plus or minus ten percent in the margin of
15 error.

16 And that would be, I believe, a similar process. It
17 still has to be confirmed once we see the loan tapes. And I
18 don't want to speak ahead of our expert but once we go through
19 the loan tapes for all the securitizations it's my belief that
20 we will be able to do a simple stratified random sample as
21 we're proposing for UBS for virtually all the other cases.

22 And, indeed, we may be able to do that for JP Morgan
23 and Merrill Lynch depending upon the timing of the
24 re-underwriting it's the expense associated with the volume
25 there that's driving us to see if we can find a further

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1 efficiency measure.

2 THE COURT: So your proposal is to produce an expert
3 report by August 9th on your sampling protocol for the UBS
4 case?

5 MR. SELENDY: That's correct. We had proposed -- and
6 the reason we had proposed a simultaneous exchange is that if
7 defendants don't want to work with us from the same sample but
8 instead are generating their own sample, we'll have the same
9 difficulty in understanding re-underwriting what they put in
10 their sample.

11 And, indeed, if they don't want to use the settled
12 protocol that we're advancing, we would like an opportunity to
13 review that and respond to it. So if they have a different
14 sample for their affirmative defenses, we don't see why it's
15 necessary but if they do, we would like to have a simultaneous
16 exchange on that date.

17 THE COURT: Okay. I am not going to order a
18 simultaneous exchange but I understand you want to produce your
19 expert report with respect to your sampling protocol on August
20 9.

21 MR. SELENDY: That's correct.

22 MR. KASOWITZ: And you propose August 31st for any
23 motion, a Daubert motion challenging that protocol and then
24 you'd respond on September 13.

25 MR. SELENDY: That's correct.

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1 THE COURT: Okay. Any objection to that schedule,
2 Mr. Kasner?

3 MR. KASOWITZ: Your Honor, I am going to defer to
4 Mr. Fumerton who is going to object, not only to the schedule
5 but to much of what my colleague in a very measured tone has
6 explained to the Court because we have a very different view of
7 what's going on here. But if it would please the Court,
8 Mr. Fumerton will present that position.

9 THE COURT: Well, I'll turn to you, Mr. Fumerton, in a
10 second. I thought I was asking an easy question.

11 MR. KASNER: We do not consent, your Honor, to that
12 schedule because we object to what is being advanced now. And
13 what I had understood at least your Honor preliminary seemed
14 disinclined to allow.

15 THE COURT: Okay. Mr. Selendy, I want to let you
16 finish your presentation.

17 MR. SELENDY: The only further point is that we had
18 proposed consistent with the Court's prior schedule that we
19 produce our expert report reflecting the re-underwriting
20 analysis March 15, 2013. The results of that analysis will
21 take into account information learned from discovery as well as
22 information from the course of third-party subpoenas and the
23 like. That can't be done until fact discovery is complete.
24 That's part of what goes into the re-underwriting assessment
25 and it's part of why we can't present a loan by loan

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1 particularized assessment as my colleague, Mr. Kasner, has
2 asked in our view a, frankly, completely untenable request. We
3 can't to that, nor should we. This is not even a standard and
4 fraud case. It's a loan by loan early expert report at the
5 conclusion of document discovery.

6 This re-underwriting exercise in other cases and,
7 logically, should follow from the collection of all the
8 relevant evidence, the application of that to the loans in the
9 sample and the generation of the expert report which would
10 contain the loan by loan breakdown together with the mapping --
11 and warranties for every single securitization in dispute and
12 together with the expert's justification.

13 THE COURT: So if you are suggesting March 15th for
14 expert report with respect to the misrepresentation notice UBS
15 case, what are the dates for the reports in the other cases?

16 MR. SELENDY: We had proposed, your Honor, that for
17 each of the other tranches we serve expert reports on August
18 15th and that would allow us to have rebuttal reports from the
19 other defendants November 7th and in time for the completion of
20 expert discovery according to your Honor's schedule by December
21 6th of 2013.

22 THE COURT: So, that would --

23 MR. SELENDY: If I may, your Honor?

24 THE COURT: Okay. I had thought I understood that you
25 might, depending on what the defendant's response was in a

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1 particular case, to revise your sampling protocol.

2 MR. SELENDY: Well, ideally, your Honor, any revision
3 of sampling protocol would come long before that date. That's
4 why we had proposed the exchange in August of this year on the
5 sampling protocol, so that if there are any modifications based
6 on Daubert or other challenges those can be resolved promptly
7 this fall before the re-underwriting exercise is undertaken.
8 And we would expect that any challenges that any of the
9 defendants may have could be presented at the same time as the
10 UBS challenge. We doubt there will be issues that vary that
11 much in other cases.

12 And the last point I wanted to mention, your Honor, is
13 that the schedule that we've proposed, the sampling first
14 followed by the re-underwriting exercise is consistent, for
15 example, with the MBIA versus Countrywide case. In that matter
16 there was a general review by the court, a sampling and the
17 re-underwriting exercise just as we proposed here was submitted
18 in the ordinary course, together with other expert reports.
19 Thank you, your Honor.

20 THE COURT: And, Mr. Selendy, what's the status of the
21 production of the loan files?

22 MR. SELENDY: Okay. With respect to the loan files we
23 understand that JP Morgan has produced most, if not all, of the
24 loan files. UBS, as I mentioned, has produced according to our
25 count 2200 of the loan files, a very small subset of the loan

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1 files in that case. We have actually produced to UBS 2700 loan
2 files relating to UBS securitizations. Those consist of files
3 that we had obtained and, of course, leading up to the filing
4 of complaint and therefore.

5 As far as I know we have little or no files produced
6 yet by any other defendant. I may be surprised but based on
7 our own analysis I don't believe we have any significant
8 production of loan files from other defendants

9 THE COURT: Let me hear from Mr. Fumerton.

10 MR. SELENDY: Thank you.

11 THE COURT: Mr. Fumerton, do you have any objection to
12 the schedule for a Daubert motion addressed to the sampling
13 protocol and the UBS case.

14 MR. FUMERTON: We do, your Honor. Robert Fumerton, on
15 behalf of UBS.

16 We can't be in a position to evaluate plaintiff's
17 proposed sample in the abstract. We need the benefit of
18 factual discovery, of deposition discovery, of full factual
19 record before we can determine even whether their sampling
20 methodology is adequate.

21 If I could give your Honor an example, Mr. Selendy
22 claims that the 2200 loans that he's provided UBS would have a
23 margin of error of ten percent. Now, defendants, certainly,
24 disagree with that and we've set forth in detailed position
25 back in June. But how can defendants be in a position to take

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1 a position on whether ten percent margin of error is
2 sufficiently precise when we have no idea of what the defect
3 rate they're claiming in these cases. Obviously, if the defect
4 rate that they identified came in under ten percent, defendants
5 couldn't be in a position sign-off or make a determination on a
6 Daubert motion before we have that information. What we need
7 is fundamental factual basis for plaintiff's claims.

8 Defendants are not seeking early expert discovery.
9 All we're asking and we appreciate that Mr. Selendy provided us
10 with the sample upon which he intends to reply, provides us
11 those 2200 loans by loan ID. But what we need now is which
12 loans are defective and why? What is the basis for those
13 claims? And if we get that information that will help narrowly
14 tailor the rest of discovery. For example, if they're claiming
15 that a specific loan has an inflated appraisal defendants may
16 want to take a third party deposition of that appraiser to
17 determine whether, in fact, the value was inflated.

18 Mr. Selendy's proposal is, essentially, give us until
19 March 15th after deposition discovery, three months before the
20 close of all fact and expert discovery, give us till March 15th
21 before we have to identify a single defective loan or the
22 manner in which that loan was defective would completely
23 deprive defendants of their due process rights to develop their
24 defenses to take discovery and third party discovery to respond
25 to the basis of plaintiff's claims.

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1 THE COURT: Good. Why has the UBS production of loan
2 files not been completed?

3 MR. FUMERTON: Your Honor, UBS does not maintain loan
4 files in the ordinary course. UBS has produced every single
5 loan file in its possession, custody or control, approximately,
6 2400. We have been asking since May 22nd for all of the UBS
7 loan files in plaintiff's possession, custody or control.
8 Plaintiff has had a huge start here. Plaintiff alleged in the
9 UBS complaint that it conducted a forensic review of,
10 approximately, 1300 loans. They alleged that in the complaint
11 to survive the motion to dismiss.

12 What we've learned since Friday now that we the 2200
13 loans in the sample, is that there is actually considerable
14 overlap between the loans they've reviewed for the forensic
15 review and loans the in the sample. In fact, approximately, 20
16 percent of the loans for three originators that they allege in
17 the complaint are the exact same loans in the sample. This is
18 work they've already done.

19 And I'd like to return to this issue of materials
20 related to the forensic review after we've finished this. But
21 UBS has produced all of the loan files it has in its
22 possession, custody or control. Plaintiff has not done the
23 same. We've asked plaintiff since May 22nd to produce
24 everything you have. It's in a discrete place. They haven't
25 produced it.

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1 What UBS has done, your Honor, is gone out and
2 subpoenaed, issued third party subpoenas to servicers, to
3 originators, to trustees, to get all of the loan files in our
4 case and we're working to get those loan files as quickly as
5 possible and that's why we've set a deadline for plaintiff's
6 identification that teed up off of the date the plaintiff has
7 all these loan files. We don't know what loan files they have.
8 Assuming Mr. Selendy's representation that they don't have all
9 of these 2200, we're working with them to get those loan files.

10 THE COURT: Okay. So on what date did you produce the
11 loan files in UBS's custody or control?

12 MR. FUMERTON: We've produced them last week, your
13 Honor.

14 THE COURT: And when did you serve the subpoenas on
15 the third parties to get the remainder of the loan files?

16 MR. FUMERTON: We served the third party subpoenas. I
17 don't have the exact date but it was shortly after the
18 commencement of fact discovery, so back in June, I believe.

19 THE COURT: And so those files then should have been
20 produced in July.

21 MR. FUMERTON: We are actively working to try to, with
22 the third parties, with the servicers, with the originators,
23 with the trustees to try to get all of these loan files. One
24 of the things we asked plaintiff for was to identify the sample
25 of 2200 loans. Now, back in June plaintiff identified a sample

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1 of a thousand loans, 1060 to be precise, that it claimed would
2 be the UBS proposal. They have now doubled that, which is
3 fine. We told Mr. Selendy and his colleagues, if you give us
4 the sample by loan ID then we can go out and prioritize the
5 production of those loan files from third party so we can go to
6 third party servicers and say, hey, you have these specific
7 loan numbers that are part of the 2200 that plaintiff wants to
8 rely on for their sample.

9 THE COURT: Excuse me just one second.

10 (Pause)

11 MR. FUMERTON: Your Honor, if I could add one --

12 THE COURT: So do you think it might be helpful if we
13 chose an afternoon the last week in August for anyone, any
14 third party who hasn't completed production of their loan files
15 to show up in court here and explain why the production has not
16 yet been completed? Do you think that might assist you,
17 Mr. Fumerton?

18 MR. FUMERTON: Yeah, we think that would be a
19 productive idea, your Honor. If I could just add one point
20 that I neglected to make earlier. When we served our request,
21 document requests for all the loan files in plaintiff's
22 possession, we served that on May 22nd. Over the next two
23 months we repeatedly asked plaintiff, what's taking so as long?
24 Why can't we get these loan files? And what we learned from
25 plaintiff is that there were all sorts of third party

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1 consent -- and maybe Mr. Selendy can address this in more
2 detail -- but plaintiff needed to obtain consent from third
3 partys to produce the loan files. But what we also learned
4 from plaintiff is that they didn't even notify those third
5 parties for months after our document requests.

6 So, again, what I think would also accelerate this
7 process is if plaintiff is ordered once and for all to produce
8 all of the UBS loan files it has in its custody, possession or
9 control. So at least we know what we have to get from third
10 partys

11 THE COURT: Well, you have to get them from third
12 partys -- I am sorry -- if FHFA produces them or not. I assume
13 that's how it normally works. One file may be more or less
14 complete than another. I don't know.

15 Mr. Selendy.

16 MR. SELENDY: We also agree. It would be a very good
17 idea, I think, to bring in the third parties that have not
18 produced files at the end of August. I think that would be
19 highly effective.

20 Just one point with respect to the notion of burden
21 for the defendants and re-underwriting using our sample. On
22 the schedule that we propose they would have, approximately,
23 eight months to do the re-underwriting exercise with the sample
24 that we provided to them last week, that's far beyond the 45
25 days that they thought was sufficient for FHFA.

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1 THE COURT: So, Mr. Selendy, you identified the sample
2 to UBS last Friday?

3 MR. SELENDY: Yes.

4 THE COURT: And you're planning to use the same
5 protocol across the board and the 16 lawsuits with, perhaps,
6 two exceptions.

7 MR. SELENDY: Yes. And subject to our expert's review
8 of the loan tapes for each deal, there is effort to ensure
9 depending upon variability and securitizations that the
10 proposal would work. But we have some high degree of
11 confidence that a simple random stratification as we've done
12 here according to FICO scores may well work for virtually all
13 of the deals.

14 In any way case the proposed confidence interval 95
15 percent with a margin of error plus or minus ten percent is the
16 target that we're shooting for for virtually all the cases.

17 THE COURT: And what is your proposal then with
18 respect to the disclosure in the other actions of the precise
19 loans that would constitute the samples in those cases?

20 MR. SELENDY: Right. We are proposing -- and this is
21 reflected in Exhibit A to my letter to the Court -- we are
22 proposing that for the other cases we would provide for Tranche
23 Two the sampling protocol on August 23rd of this year and then
24 for Tranche 3, September 13, and Tranche 4, September 30. So,
25 again, all of those would be done very quickly over the next

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1 few months.

2 THE COURT: Thank you very much. And do you want to
3 address the status of the disclosure of the loan files in
4 FHFA's possession?

5 MR. SELENDY: Right. My colleague, Mr. Schirtzer, I
6 think will address that together with other production issues.
7 It is my upstanding we're working to make all of that
8 available.

9 THE COURT: Mr. Schirtzer? Ms. Chung.

10 MS. CHUNG: I think it was two weeks ago that we
11 produced most of the loan files that we this in our possession
12 relating to UBS securitization. The ones that we have compared
13 to the universe of loans is a small number. It would never get
14 us the entire sample. It would never get us to the 44,000
15 loans that are issued in the UBS case. But there is a
16 remainder left and we could produce those this week. That's
17 not a problem.

18 As your Honor pointed out, the real issue though is
19 that would never get us to even the sample loans and so we will
20 have to turn to the third party. UBS in a case for which third
21 parties hold the lion's share of the loans. In many of the
22 other cases that's not the case. So the fact that we only
23 have -- JP Morgan, UBS and I think yesterday we got loan file
24 productions from First Horizon. That means that we're still
25 well behind the ball in terms of getting the loan file that

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1 will allow us to do the underwriting.

2 THE COURT: So, Ms. Chung, how did FHFA get the loan
3 files that it has?

4 MS. CHUNG: Yes, your Honor. Thank you.

5 We got -- some of the loan files were subpoenaed from
6 servicers or trustees. So FHFA had gotten these loan files
7 under their own civil investigative powers for purposes
8 including, but not limited to this litigation in the lead-up to
9 litigation. And as Mr. Fumerton mentioned, in some of those
10 cases we have confidentiality agreements for notification
11 duties to the third parties from whom we obtained the files.
12 So there was a process of notifying those entities that we were
13 about to produce the files in this case. Now that process is
14 complete or nearly complete. But we have turned back to the
15 defendant's. Some of loan files that we have and we have every
16 intention to turn back the remainder of those loan files very
17 promptly.

18 There is a misimpression though that somehow we have
19 all the loan files that relate to those securitizations. The
20 loan files that we have were not gathered just for this
21 litigation and they're only a fraction of what are at issue in
22 the 15 actions that we have here.

23 THE COURT: So consents on loan files, it may be moot
24 now but I would have been happy to issue an order requiring any
25 objection to be made in writing to me within two weeks with the

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1 understanding that the files would be produced, you know, two
2 weeks and one day hence. So if there is any similar problem
3 with production think of me as a resource.

4 MS. CHUNG: Thank you, your Honor. We appreciate
5 that.

6 THE COURT: Okay. So in all actions before me I will
7 expect the loan files to be produced in their entirety by
8 August 29th. To the extent they are not, I'd like a report on
9 August 29th. And I'd like, I will hold a conference on August
10 30th. I'll issue an order to show cause for any entity that
11 has failed to produce all of the loan files in its possession
12 by August 29th to appear on August 30th at three o'clock and
13 explain why it has not completed production.

14 So I would like every party before me, plaintiff and
15 defendants, to provide me with a list by tomorrow of all the
16 parties who have possession of loan files and who need to be
17 subject to my order.

18 Do I have jurisdiction to order production out of
19 state? How many of the loan file -- I might have to ask for
20 some help from some colleagues in other districts here.

21 Ms. Shane.

22 MS. SHANE: Yes, your Honor. Thank you for the
23 afternoon to be heard.

24 JP Morgan, as your Honor may recall, is both a
25 defendant in an action in which it is physically producing loan

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1 files for purposes of the use in that action. It also has
2 possession of loan files that may be relevant to other actions
3 including, for example, in the UBS action. So JP Morgan is in
4 a particular position of producing madly loan files for all
5 different purposes in its different capacities in that regard.

6 As we discussed last week, J.P. Morgan has already
7 produced 66 million pages of loan files and is continuing to
8 produce as fast as it possibly can. J.P. Morgan understood
9 that the document production deadline in this case was
10 September 30th. It is a date that we discussed every hour of
11 everyday with respect to many pads of document production and
12 will continue to proceed as quickly as we can in order to meet.

13 This order that your Honor is entering moves that up
14 by a whole month where it was already going to be extremely
15 tight, as I understand it. Or if it does not and gives us an
16 opportunity to be heard as to our particular circumstance and
17 why it is that this would be enormously difficult, if not
18 actually impossible for an entity it in this situation to meet
19 despite its best efforts, we would appreciate that opportunity
20 to be heard. We don't want to wait until August 29 to bring
21 that to your Honor's attention.

22 We are aware from the issuance of nonparty subpoenas,
23 not only for ourselves but to a host of other entities, most of
24 which are not here and are not here in any capacity, not
25 represented, not parties, not anything that they are in many

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1 jurisdictions. And that the process of working with those
2 entities to bring about their compliance with those subpoenas
3 is one that has been proceeding with a good deal of attention
4 and intensity on behalf of all defendants and the plaintiff may
5 be making efforts of their own.

6 It is not as easy as it sounds, your Honor. Loan
7 files in cases of that age are, themselves, quite old. There
8 are multiple versions, as your Honor alluded to, in different
9 depositories, in different forms, with different levels of
10 completeness. Many are not electronically maintained. And
11 even the identification of which loan file one is talking about
12 requires a fair amount of matching exercises that can consume
13 some time on the part of people who are most familiar with
14 those files and the ways in which they retract from institution
15 to institution but for purpose one versus purpose two.

16 So I don't in any way mean to suggest that it won't
17 happen, that all these things will be collected but August 30th
18 would be very, very difficult at least for those entities like
19 JPM that are in possession of the large quantities of them and
20 are trying to prioritize.

21 THE COURT: Thank you, Ms. Shane.

22 Am I right that these loan files were gathered
23 together in one location for a particular securitization or
24 not?

25 MS. SHANE: Not necessarily, your Honor. It would

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1 depend on the securitization. Some of these securitizations
2 were backed by loans that were almost entirely or in some
3 instances entirely originated by an institution. There were
4 processes that had to be undertaken, including due diligence,
5 for example, that would have required some entity or number of
6 entities to review the loan files in some form in connection
7 with a securitizations. And at the close of that process, once
8 the securitization happened, loan files could be and were, as I
9 understand it, sent to any number of different additional
10 places. Servicers, who would have the responsibilities to
11 maintain the loans over time, could end up having most of them.
12 Servicers changed over time and what would be relayed from one
13 to the next for the next purpose, again, could be some or all
14 of the file. And they would not necessarily all travel
15 together because different supporting loan groups and different
16 tranches could have different groups of loans that require
17 different forms of attention.

18 Some loans would get paid and paid early. Some would
19 get defaulted on. And those would all go in different
20 directions depending on what path the actual underlying
21 financial transaction was taking. So assembling them back
22 together again is a challenge. It will happen and people are
23 working very hard on having it happen. Sometimes it's an easy
24 repository which is why we have been able to get to 66 million
25 in the very short period of time so far since your Honor had

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1 ordered that it happen, but the next couple hundred million or
2 more will be more challenging.

3 THE COURT: Well, those are talking about pages, the
4 66 million. How many loan files does that represent?

5 MS. SHANE: The number is in the tens of thousands and
6 we have tens of thousands to go, at least.

7 THE COURT: So, one, I don't have authority over who's
8 not here or at least in New York State present to command their
9 appearance. I don't have a sense of how many, at least, I
10 don't think I do. I don't have a sense of where the problems
11 in production lie.

12 Ms. Chung.

13 MS. CHUNG: Your Honor, as to your original
14 suggestions to have the parties -- both sides have issued
15 subpoenas to entities that have possession of loan files and
16 we're promptly doing it. The requests are all out there. If
17 it will be helpful to the Court to have the list of those
18 entities, where they are and which districts they're in, we
19 could, certainly, do that. That would be a starting point.

20 THE COURT: The September date, September 30th, I
21 think, whatever date it was in the order is for substantial
22 completion of document production. It's not, and nobody's
23 treated it as such, as the date on which production is to be
24 made. Parties are making it on a rolling basis and there's no
25 way it could be substantially complete on September 30th unless

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1 people were making an ongoing effort.

2 So, Ms. Chung, give me a sense -- and you know what,
3 we may take a break here so that the parties have a chance to
4 talk -- what would and could be accomplished by a late August
5 conference? I don't want to have one -- there are too many
6 people in this courtroom now -- unless it's going to be, serve
7 a useful purpose. So we'll address that again after we take a
8 break.

9 (Continued on next page)

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1 Returning to our schedule, Mr. Fumerton argued, as I
2 understood it, that it is premature to have a Daubert motion
3 addressed to the sampling protocol that the plaintiff intends
4 to use until one knows the defect rate. I'm not sure I find
5 that persuasive. Indeed, a motion with margin of error plus or
6 minus 10 percent, someone could say that that is insufficient
7 in and of itself. Indeed, I think the expert for the
8 defendants took that position in the June submissions.

9 A lot of work is going to be invested by the parties,
10 not just the FHFA but each of the defendants, in addressing the
11 loans selected through the plaintiff's sampling protocol. It
12 seems to me that it would behoove everyone to know whether or
13 not it is going to be the basis of the receipt of admissible
14 evidence at trial.

15 I think the briefing should proceed on roughly the
16 schedule suggested by the plaintiff. I know we are in August
17 and therefore it may affect -- I don't know who is going to be
18 the principal brief writer -- vacation schedules, so I'm not
19 wedded to specific dates. But I think a fully submitted motion
20 sometime in September, mid September, would be great.

21 I think it should run across all the actions before
22 me. I think UBS can write the principal brief, but everyone
23 should have an opportunity to make any additional arguments.
24 If UBS wants to cede the principal brief writing
25 responsibilities to the defendants in another case, that's

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1 fine, as long as everyone understands they have an opportunity
2 to be heard.

3 I'll expect the plaintiffs to present their expert
4 report on August 9th. I'm adopting their date. I'm going to
5 ask you, Mr. Kasner, to coordinate a briefing schedule that
6 accommodates everyone's scheduling needs in consultation with
7 Mr. Selendy and advise me later this week what the proposed
8 schedule is so that I have something fully submitted in roughly
9 mid September.

10 MR. KASNER: We will do that, your Honor. With the
11 utmost respect, your Honor, I just would state that for UBS we
12 vigorously object to being required to address Daubert expert
13 issues in the absence of a complete factual record prior to the
14 time that basically any document discovery has been provided,
15 prior to the time that any deposition discovery has been taken.
16 I note that, your Honor. Obviously, we will do what your Honor
17 orders, but do I place our vigorous, vigorous objection to this
18 procedure on the record.

19 THE COURT: Thank you, Mr. Kasner.

20 Ms. Shane.

21 MS. SHANE: Yes, your Honor, I'm sorry if I'm
22 confused, but it seems as though the schedule for the plaintiff
23 to announce what its planned sampling protocol would be in the
24 other cases extends so far into September that those in the
25 other cases, especially tranche 4, which wouldn't receive word

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1 of what is being proposed until September 30th, would be in no
2 position whatsoever to meaningfully participate in the motion
3 practice.

4 The proposed date that I understand Mr. Selendy to be
5 advancing for tranche 2, which is what JPM and Merrill Lynch
6 are in, is August 23rd, which is certainly better than
7 September 30th. But if we are expected to participate
8 meaningfully in a motion directed to the sufficiency of a
9 sample that, by Mr. Selendy's account, differs markedly from
10 what has been proposed with respect to UBS, we may very well
11 need more time to assess whatever it is we learn at that time.

12 We would echo Mr. Kasner's concern about the process
13 here but would suggest, your Honor, that it could usefully be
14 customized so that what we are addressing is the sampling
15 proposal in its abstract form, and only the sampling proposal
16 in its abstract form, so that all other potential objections,
17 that is, with respect to its application or with respect to
18 what in the reasonable exercise of professional judgment a
19 statistician would learn as he went and would expect to do as
20 he went, those kinds of objections and Daubert challenges we
21 would expect to be able to make to your Honor at such time as
22 they became ripe, which they couldn't possibly have done by mid
23 September.

24 With that, we would also think it could begin to solve
25 some of the problems your Honor is wrestling with regarding

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1 loan file production. To the extent that, having preserved all
2 of defendants' rights regarding that sample, the plaintiff at
3 least has a basis on which to focus its efforts to get
4 particular loan files, then perhaps we are not talking about
5 the need to have those loan files come in by September. They
6 have to come in eventually, because none of us are giving up
7 the right to go beyond the samples, but they don't have to come
8 in as fast. We can concentrate on the ones that are in the
9 samples.

10 THE COURT: Thank you, Ms. Shane. Very helpful.
11 Obviously, as to any further objections that defendants might
12 have to the admissibility of the plaintiff's expert testimony
13 that couldn't fairly be made with respect to the August 9th
14 report, your rights are preserved. You can only meet the
15 objections that would be appropriate with respect to the August
16 9th report and not anything more.

17 Mr. Selendy, I think Ms. Shane has a very good point.
18 Are you committing yourself now to using the same sampling
19 protocol for all of the cases before me?

20 MR. SELENDY: I, as I say, don't wish to get ahead of
21 our expert on this. The objective is to be as similar as
22 possible to the protocol we have advanced for UBS. What I
23 would suggest is a way that is analogous to what your Honor did
24 on the motion to dismiss briefing.

25 To the extent any defendant has objections to the

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1 proposal that is set forth in UBS, those can be done on a
2 coordinated basis. To the extent there are any differences
3 introduced in the tranche 2 matters in particular or
4 potentially in other cases, as your Honor suggested, objections
5 can be reserved and advanced as soon as we roll those out.

6 Our strong effort is to provide a unified and common
7 approach across all these cases. We just need to confirm the
8 feasibility of that with our expert as we continue to process
9 loan tapes in the later tranches.

10 THE COURT: Will you know by August 9th whether you're
11 using the same protocol with respect to all the cases or not?

12 MR. SELENDY: We will try, your Honor. I think it may
13 take us another week or possibly two weeks after that. We will
14 do our level best to see if we can get that done. I think
15 there is a fair amount of processing. My understanding is that
16 the schedule we have provided to your Honor is as fast as we
17 can do it to issue the actual samples, but it may be that we
18 can run various tests on the data that's in the loan tapes to
19 confirm similarity.

20 THE COURT: I don't think it is efficient to have this
21 briefing before each of the defendants knows what protocol they
22 are facing in their case. No defendant has standing to object
23 to the protocol you're using in the UBS case except the UBS
24 defendants. Only if there was one protocol that was going to
25 be applied across the board and that was known on August 9th

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1 does it make sense for all the defendants in the 16 cases to be
2 heard.

3 Mr. Selendy, I'm going to ask you to work with Mr.
4 Kasner, who will coordinate for the defendants -- I won't
5 necessarily expect a motion on August 9th -- when you have your
6 expert report on the sampling protocol with potential
7 variations across the 16 cases. I think it might be
8 informative to the defendants to see the variations. They may
9 say that that is an additional argument for the insufficiency
10 in the UBS case, that there is a dramatically different
11 protocol used in the Merrill Lynch case.

12 MR. SELENDY: Just so I understand, your Honor, are
13 you proposing that what we do is a single report that will
14 address all of the cases and will note variability where it
15 exists?

16 THE COURT: Yes.

17 MR. SELENDY: Then I will work with Mr. Kasner and our
18 expert to determine the earliest date on which we could do
19 that. Thank you.

20 THE COURT: Good. Ms. Shane?

21 MS. SHANE: Your Honor, may I ask that the level of
22 specificity in that report, whenever it may come, be as
23 detailed as it was for UBS in the sense that we start to have
24 identification of the actual loans that will be at issue? That
25 would permit us to start going out after loan files in a much

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1 more targeted way.

2 THE COURT: I think the identification of the
3 individual loan files is a separate issue, an important issue
4 but a separate issue from the methodology. I'm not going to
5 urge the identification to be done on a faster schedule than
6 Mr. Selendy has now outlined.

7 MR. KASNER: Your Honor?

8 THE COURT: Mr. Kasner.

9 MR. KASNER: If it please the Court, I had two
10 questions for the Court, one of which I believe my colleague
11 Mr. Fumerton will raise, with respect to the forensic review,
12 which I understood ordered on the telephonic conference that I
13 was not able to make that day, be deferred in relation
14 potentially to expert discovery which we seem to be
15 transitioning into. I will leave that to Mr. Fumerton, who was
16 on that call, if it would please the Court.

17 I would however inquire of the Court the following.
18 As Mr. Fumerton explained, the nature of a potential Daubert
19 challenge in theory to plaintiff's expert's methodology will
20 vary depending upon the nature of the breach, the severity of
21 the breach, precisely what it is they are claiming is breached.
22 A margin of error of 10 percent either way, as my friend from
23 Fumerton explained to the Court, will impact review potentially
24 under Daubert.

25 I understood from Mr. Selendy to the Court earlier

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1 that it will take him until March of 2013 to reunderwrite the
2 loans notwithstanding that there is at least a 20 percent
3 overlap between the loans that were in the forensic review and
4 the loans that are in the sample. Presumably at least that is
5 the 20 percent of the loans. They have a sense of what the
6 breach is that they are contending exists here.

7 I would encourage the Court to please rethink whether
8 it is appropriate for us to respond in a Daubert context
9 without at least knowing what are the breaches that the
10 plaintiff is contending, as opposed to addressing hypothetical
11 methodologies under Daubert that in a particular factual
12 context may or may not be appropriate in terms of your Honor's
13 gatekeeping function.

14 THE COURT: Thank you, Mr. Kasner. I'm going to just
15 assume everyone thinks the objections made by Mr. Fumerton and
16 Mr. Kasner are precisely what they would like to say.

17 MR. BENNETT: I have a question actually as well, your
18 Honor. Ed Bennett from Williams & Connolly for Bank of America
19 and Merrill Lynch. Is the intention here, your Honor, to issue
20 an advisory opinion so they can adjust fire going forward and
21 change their expert opinions or expert methodologies after the
22 Court rules, or, if the Court rules upon these motions that
23 they don't pass the muster of Daubert, are they done?

24 THE COURT: No, they are not done.

25 MR. BENNETT: We would object to that as well, your

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1 Honor, under the federal rules and the constitutional issues we
2 briefed earlier in December.

3 THE COURT: Good. No, I don't issue advisory
4 opinions.

5 MR. CLARY: May I ask a question, your Honor?

6 THE COURT: Yes.

7 MR. CLARY: Richard Clary from Cravath for Credit
8 Suisse. As I understood what your Honor said most recently --

9 THE COURT: As opposed to?

10 MR. CLARY: Earlier in this hearing.

11 THE COURT: Yes, or in June.

12 MR. CLARY: At the very end of your discussion with
13 Ms. Shane, if I understood correctly, your Honor, those of us,
14 for instance, in Credit Suisse we may or may not have the
15 actual identification of the loans in the sample at the time we
16 are supposed to be raising a Daubert challenge. We have the
17 methodology in the abstract of how we would pick them. I'm
18 assuming that would mean we would know how many loans would be
19 picked but we wouldn't know which loans.

20 Does that mean, your Honor, that subsequently we will
21 have follow-on Daubert motions if we conclude that the loans
22 identified by the plaintiff don't actually meet the criteria
23 that they say they are going to meet if they haven't already
24 picked them? Do you understand my question? Perhaps I was not
25 clear.

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1 THE COURT: Will there be follow-on Daubert motion
2 practice? No doubt there will. There are motions in limine
3 scheduled for each tranche, if I remember correctly. Thank
4 you.

5 MR. FUMERTON: Your Honor, may I be heard?

6 THE COURT: Mr. Fumerton.

7 MR. FUMERTON: On behalf of UBS, we are still
8 operating in the dark here. It's been three months. Plaintiff
9 hasn't identified a single loan. What we would ask is that
10 with respect to --

11 THE COURT: Wait one minute. They last Friday
12 identified something like 2200 loans, I think.

13 MR. FUMERTON: That's correct, loans that will
14 constitute the sample. But they still haven't identified a
15 single loan they claim is defective or the manner in which it
16 is defective.

17 Now we know there is an overlap. This is an overlap.
18 They have alleged the forensic review in the complaint of over
19 a thousand loans. We know there is an overlap with respect to
20 three securitizations of approximately 20 percent. They have
21 that information. Mr. Selendy says they need to go reunder-
22 write a loan. They already reunderwrote that loan. They have
23 alleged it in the complaint.

24 We think the plaintiff should, at a minimum, be
25 ordered with respect to those overlapping loans to disclose the

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1 loans they claim are defective and the manner in which they are
2 defective separate and apart from the overlap. We still think
3 we are entitled to the results of the forensic review alleged
4 in the complaint. We think we are entitled to discover the
5 methodologies that plaintiff used in that forensic review to
6 survive a threshold motion practice.

7 Now that we know that there is an overlap, that
8 information is even more relevant. Imagine if in one of the
9 overlapping loans plaintiff flip-flopped, so for purposes of
10 forensic review in the amended complaint they allege it was
11 defective, now they allege it's not, or vice versa. This is
12 all fertile information for cross-examination. They have
13 either waived the privilege or not. We think it is clear under
14 applicable case law that by putting it at issue in the
15 complaint, they have waived it. We are aware of no authority
16 which would enable them to sit on that information which
17 plainly discoverable in this case.

18 THE COURT: Thank you, Mr. Fumerton.

19 MR. FUMERTON: Thank you.

20 THE COURT: Let's talk a little bit about the schedule
21 here. Mr. Selendy, I understood you to be saying that when you
22 had the underwriting guidelines which I'm going to assume are
23 being gathered now and certainly would be produced by September
24 30th, and the loan files, that you could begin your reunder-
25 writing process, that you could do that, in terms of staffing,

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1 roughly at a rate of 4 to 5,000 loans per month, and that there
2 are 2,200 loans in the UBS case that your sampling protocol has
3 identified. Do I understand that correctly?

4 MR. SELENDY: That's correct, your Honor. As I
5 mentioned, because of the project of mapping guidelines against
6 the loans, I can't take the 4 to 5,000 rate and say it would
7 only be two weeks for UBS. What I understand from talking with
8 our experts is that it will take approximately three to four
9 months, once we have an agreed-upon sample and the guidelines
10 and the loan files to build the process, to reunderwrite all
11 the loans, to write up the results, have them validated by our
12 testifying expert, and have them available in a report. In
13 other words, if we have an agreed-upon sample that has survived
14 whatever challenges defendants may raise and we have the
15 applicable guidelines and loan files, from that point forward
16 we would estimate somewhere between three and four months.

17 We had suggested March 15th because that was
18 consistent with the Court's prior schedule for expert reports
19 in the UBS action.

20 THE COURT: I would like you to talk to Mr. Fumerton
21 or Mr. Kasner, whoever is the lead attorney on this, about a
22 schedule for that portion of the process and the exchange of
23 expert reports. What I'm thinking about is a Daubert decision.
24 Hopefully, I'm going to have briefing complete sometime in
25 September. It might not happen, I understand that.

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1 I'm thinking about after I rule on the Daubert
2 motion -- again, counsel should talk about this with each
3 other -- something like two months for the UBS expert report
4 and something like six weeks for their responsive report. I
5 want you to have a discussion with each other because you
6 understand this in a way that I don't, obviously.

7 MR. KASNER: Thank you, your Honor. We will talk to
8 Mr. Selendy, of course.

9 By way of example and with respect to illustrating the
10 difficulties we believe in what your Honor is proposing -- I
11 know I have beaten a dead horse about the early Daubert motion.
12 Now I'm going to shift gears a little bit to the difficulty of
13 not having complete fact discovery to provide an expert report
14 to address what they put in.

15 If your Honor contemplates a Daubert decision,
16 quote-unquote, hypothetically in October, just
17 hypothetically -- and I wouldn't presume to suggest what the
18 Court intends by way of the schedule -- November, December, we
19 get an expert report in December, the FHFA identifies the bases
20 I guess finally in December, the bases on which they are
21 contending this loan was breached for that reason, and this
22 breaches that representation, we then need to sit down and have
23 Mr. Fumerton explain to the Court and decide what are the
24 nature of the breaches and what discovery do we need to take.

25 If they don't give that to us until December and then

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1 your Honor contemplates six weeks, we have to determine if
2 there is additional document discovery that we need, we have to
3 depose people that may be relevant for the expert to evaluate
4 it. We are entitled under the rules for our expert to have an
5 opportunity to consider the discovery record that we are
6 making. It really is putting UBS in an impossible, impossible
7 position in a way that it cannot adequately defend itself.

8 I would urge the Court to consider a schedule where
9 the FHFA puts their expert report in whenever they say they are
10 ready to do it, with reasonable time for us to take fact
11 discovery. Then, as in every other case, once fact discovery
12 is concluded, we have an opportunity to do expert discovery and
13 expert reports in the orderly course.

14 Your Honor, that is the nature of scheduling that the
15 Court is familiar with in garden variety breach of contract
16 cases which barely make the threshold for diversity in this
17 court. We are facing a multibillion dollar exposure in this
18 case.

19 Your Honor heard, and your Honor will hear a lot over
20 the course of the next months, I promise you, there is an
21 effort on the part of the Fannie and Freddie to run the clock
22 on the discovery schedule. By that I mean everything gets
23 backloaded, nothing happens quickly, in the hopes that by the
24 end of the year we're done. So, on the issue of the notice,
25 your Honor --

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1 THE COURT: Mr. Kasner, if I was going to point
2 fingers in that direction, I wouldn't be pointing my fingers at
3 the first table.

4 MR. KASNER: Your Honor, with respect, we are moving
5 heaven and earth. If your Honor wishes to come to 4 Times
6 Square, I assure you day and night we are working round the
7 clock to produce whatever we have. I advised the Court at the
8 beginning of this case, when your Honor selected the UBS
9 case --

10 THE COURT: Mr. Kasner, we have so much to do.

11 MR. KASNER: I know. But we weren't the loan
12 originator, your Honor. We have given over everything we have.
13 The government -- Fannie, Freddie -- GSE, excuse me, waited
14 months knowing that they needed consents on loan files to send
15 out those consents. It was only after we had to pressure them
16 to do it.

17 I apologize, your Honor. But really, with all due
18 respect, we are entitled to be able to defend the expert report
19 on a fully developed factual record. Six weeks simply isn't
20 enough.

21 THE COURT: Actually, I'm not quite sure that that's
22 what is at stake here. To the extent that you're attacking the
23 findings on the application of the sampling protocol concerning
24 the misrepresentations, I'm not sure you need fact discovery
25 for that. No doubt you're going to have expert reports on many

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1 different topics, some of which are more responsive to the fact
2 record as it gets developed in January and February.

3 In any event, I know you're going to talk with Mr.
4 Selendy about the schedule and make a proposal.

5 MR. KASNER: Thank you, your Honor.

6 MR. SELENDY: May I, your Honor, very briefly? I
7 don't want to presume to tell Mr. Kasner how to defend his
8 case, but in other cases, once the sample is identified, it
9 would be incredible to me if defendants were not working to
10 examine those loans and do any reunderwriting they wished to do
11 before our expert puts in his report on that. Mr. Kasner will
12 have eight months to do that.

13 MR. KASNER: Your Honor, for the record, we don't have
14 the loan files. We can't do a reunderwriting. We don't have
15 all the loan files, your Honor.

16 THE COURT: Thank you.

17 Since I have clearly not achieved my goal of giving
18 happy news to the defendants on the first topic, let's turn to
19 another one and see how we do. I have submissions about
20 whether or not the defendants should be able to get discovery
21 from the plaintiff and its constituent parts of document
22 custodians in the single- and multifamily business portion of
23 their enterprises.

24 Right now I understand that consultation among the
25 parties has resulted in an agreement that FHFA will produce

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1 documents from 81 document custodians, and the issue is whether
2 or not they produce documents from an additional 164
3 custodians. The plaintiff represents that it will be
4 producing, quote, upwards of 1.7 million, closed quote,
5 documents.

6 The parties presented me with a lot of attachments to
7 their letters, and these included policy statements from Fannie
8 Mae or Freddie Mac, internal investigation report, documents
9 more in the nature of an annual report, documents from this
10 litigation and that litigation, emails, lots of different kinds
11 of documents. The defendant had highlighted certain pages and
12 portions of these materials.

13 Preliminarily, before I give defense counsel an
14 opportunity to be heard, I am not going to require that the
15 plaintiff produce electronic discovery from the additional
16 custodians, 164, in these other lines of business. I have many
17 reasons for that decision. I don't know if, Mr. Kasner, you
18 wanted to be heard on this or someone else from your team.

19 MR. KASNER: If it please the Court, my partner Joe
20 Sacca would present arguments as to why we disagree with the
21 Court's tentative conclusion.

22 MR. SACCA: Your Honor, Joseph Sacca from Skadden Arps
23 for UBS.

24 First of all, let me say that I think perhaps there is
25 a misunderstanding about the number of custodians that has been

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1 bandied about and whether they are tied directly to the issue
2 of discovery into areas outside of the particular
3 securitizations at issue in this case.

4 Across the 17 cases, your Honor, defendants have
5 proposed a number of additional custodians to the FHFA. Many
6 of those are people that we know were directly involved in the
7 securitizations at issue on our case. For example, for UBS, we
8 asked the FHFA to add a number of custodians who dealt with UBS
9 on these particular securitizations. They have declined in
10 many instances. They have given us, quite frankly, no reasoned
11 explanation for why we can't have the files of people that
12 dealt with us on this particular securitization search.

13 Your Honor, the question is not if we are allowed to
14 inquire outside the particular people who dealt with these
15 securitizations, will that require 164 additional custodians.
16 That is not the case, your Honor.

17 Let me be absolutely clear here. We are interested in
18 the quality of the discovery we get, not the quantity of the
19 discovery we get. We are not interested in increasing the
20 number of custodians. We are interested in making sure we are
21 looking in the files of the appropriate people, people who will
22 have information that will allow us to defend ourselves in this
23 case.

24 We are not interested in the strict number of
25 documents the FHFA produces. If they produce 1.7 million

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1 documents to us, your Honor, or 17 million documents to us, if
2 those documents don't contain the facts that we need to defend
3 ourselves, they are useless to us.

4 What we did here, your Honor, as the parties had
5 agreed back at the time we put in our rule 26 report, we served
6 a 30(b)(6) notice on the FHFA. What we wanted to do was take
7 discovery of them to find out how their different groups worked
8 together, how they were integrated, what information was shared
9 with whom. We were met with objections.

10 I will note, your Honor, for the record that late last
11 week the FHFA served UBS with a 30(b)(6) notice seeking the
12 same type of information that they are now saying we are not
13 entitled to from them. If I might, your Honor, this is just an
14 example.

15 Topic 17 of the 30(b)(6) notice they served on us
16 asked for the sources of your, and "your" is each UBS
17 defendant, sources of your knowledge prior to each
18 securitization concerning the underwriting practices, policies,
19 and procedures of the originators of the mortgage loans to be
20 included in that securitization, including but not limited to
21 prior business relationships or deals with the originator and
22 the identity of your employees who communicated with the
23 originators.

24 Your Honor, they are asking us for information about
25 what UBS knew about the originators who originated loans in our

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1 securitizations but not the particular loans in our
2 securitizations. That is much of what we want from them, your
3 Honor. In the mortgage industry, aside from the originators
4 themselves, Fannie and Freddie knew more and were more deeply
5 involved with loan originators than anybody.

6 Mr. Selendy mentioned earlier today, and it's all over
7 their complaint, this contention they have that loan
8 originators systemically abandoned their origination guidelines
9 not with respect to the particular loans in our case, but in
10 general systemically abandoned their guidelines.

11 We know Fannie and Freddie, your Honor, conducted
12 operational reviews of loan originators. We know Fannie and
13 Freddie created documents called originator scorecards, where
14 they graded, as we understand it, how originators were doing
15 complying with their guidelines.

16 Under the FHFA's position here, if they conducted an
17 operational review of an originator who had loans in one of the
18 UBS securitizations, if they took the results of that
19 operational review, and let's say it concluded that this
20 particular originator had abandoned its origination guidelines,
21 we know that Fannie and Freddie each had high-level committees
22 that were designated, designed to be bridges between the PLS
23 business and the single-family business to facilitate the flow
24 of information back and forth, including information, for
25 example, about originators.

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1 Hypothetically, if Fannie conducted an operational
2 review of an originator and that originator had loans in the
3 UBS securitizations, Fannie concluded that that originator had
4 systemically abandoned its origination guidelines, that report
5 gets communicated to the Fannie private label advisory team
6 which had on it a representative of the single-family business.
7 We will never seen that unless that report happened to get
8 passed on and ends up in the email of the trader who bought the
9 particular UBS Securities.

10 We think that is far, far, far too narrow a construct
11 of discovery and will prevent us from raising important issues
12 in this case, such as what knowledge triggered the running of
13 the statute of limitations.

14 There are fraud defendants who I know would like to
15 speak with your Honor and block out some particular documents
16 who have reasonable reliance issues that they need to explore.
17 There is the issue of the knowledge defense under section 11
18 and the plaintiff's affirmative need to prove an absence of
19 knowledge under their section 12. There are issues of what was
20 material to the FHFA, your Honor, that all relate to issues
21 like what did they know about loan originations. We are going
22 to be, under their objection, deprived of all of that
23 information.

24 Your Honor, I'd like to take a step back to what
25 brought us here today, which is our 30(b)(6) notice. What we

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1 wanted to do and accomplish through our 30(b)(6) deposition was
2 to build a factual record that would demonstrate how
3 information flowed, where it went, what the nature of the
4 information was. The FHFA refused to give us that.

5 We served our 30(b)(6) notice on June 28th seeking a
6 deposition on July 12th. We received objections. Then, about
7 a month after we had served our 30(b)(6) notice, we got a
8 written response to our 30(b)(6) notice. We got a narrative
9 response, which is something that FHFA decided unilaterally
10 they were going to provide. They didn't want a witness. They
11 said, we are going to give you a writing and in that writing we
12 are going to explain to you how we were structured and how
13 information flowed.

14 Your Honor, quite frankly, that writing raises more
15 questions than it answers. The effort that went into educating
16 the lawyers to create this narrative could easily have gone
17 into educating a witness to sit for a deposition. That would
18 have allowed us to build the kind of factual record we think we
19 need to put before your Honor before you can properly rule on
20 the scope of permissible discovery in this case, which is
21 something we are very much anxious to do.

22 Your Honor, I'd like to highlight a couple of things
23 from this written response and the information that we have
24 been able to develop outside of the formal discovery process
25 which we think at minimum warrants our ability to take a

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1 30(b)(6) deposition to further inquire into some of these very,
2 very, very important issues to us.

3 Your Honor, I alluded to it before. Both Fannie and
4 Freddie had senior-level committees that were designed to
5 bridge their single-family and PLS businesses. We submitted a
6 small packet of demonstratives to you. I think we also shared
7 it with FHFA's counsel earlier.

8 I'd like to draw your attention, your Honor, to the
9 third one, which is a little chart here, which illustrates
10 graphically the input that the Fannie Mae single-family
11 business had on the private label advisory team, which then in
12 turn both received from and provided information to the capital
13 markets group, which is the group that was responsible for
14 making these investments.

15 What we do know, your Honor, from what the FHFA has
16 told us is that information flowed from single-family to
17 capital markets. What they haven't disclosed yet and what we
18 very much need to see is what the nature of that information
19 was. They have said that they had some policies in place that
20 prevented information flow, but they were not absolute. We
21 know that.

22 The policies appeared to us to be quite limited to
23 loan-level information and pool-level information primarily
24 that couldn't be shared between single-family and the PLS
25 business. But that does not mean, for example, that

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1 information gathered during an operational review of an
2 originator couldn't be shared. We think that in fact could be
3 shared.

4 Your Honor, on the Freddie side, page 9 of the handout
5 that you have --

6 THE COURT: Excuse me. With respect to page 3, I'm
7 trying to understand from the source, is this demonstrative
8 something that you prepared from narrative information?

9 MR. SACCA: Yes, your Honor. I'm sorry. I should
10 have called your attention to that before. There is a note on
11 the bottom right corner of the page that tells you what the
12 source of this is. It's information that they gave us in the
13 narrative response to the 30(b)(6) and one document, private
14 label security's risk policy, which is in the binder of
15 information that we submitted to your Honor.

16 THE COURT: You created the diagram based on that
17 description?

18 MR. SACCA: Yes.

19 THE COURT: Thank you.

20 MR. SACCA: I'm sorry, your Honor. The quotes are
21 Fannie's language.

22 THE COURT: Yes.

23 MR. SACCA: But the diagram was created by the defense
24 side. Your Honor, page 9 are some selected quotes of Freddie
25 Mac's special litigation committee in a derivative litigation

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1 against the company that talks about the company's enterprise
2 risk management committee, which is apparently an analog to the
3 private label advisory team on the Fannie Mae side. This, in
4 terms of Freddie's business, you will see from the quote, was
5 created for the purpose of the different business areas meeting
6 to share information with each other. Your Honor, what we need
7 to know, of course, is the precise nature of that.

8 But we do know that the highest levels of the company
9 were sharing information across the private label securities
10 business and the single-family business, and this information
11 was obviously making its way somehow into the decisions of what
12 securities to purchase.

13 I'd like to call your attention to two brief issues,
14 and this is just by way of example of things that are in the
15 FHFA's narrative that certainly warrant further inquiry, seem
16 inaccurate to us, your Honor, and we certainly need the
17 opportunity to look into further.

18 Page 14 of the FHFA's second amended objections and
19 responses to our Rule 30(b)(6) notice, which I hope your Honor
20 will be able to find in the packet of documents we gave you,
21 behind tab number 2 under the larger tab 30(b)(6).

22 THE COURT: I'm not sure I'm in the right binder. I
23 have a Freddie Mac portion and a Fannie Mae.

24 MR. SACCA: Before the Freddie Mac portion, your
25 Honor, I think is a smaller 30(b)(6) portion.

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1 MR. KASNER: If it please the Court, I can provide one
2 to your Honor.

3 THE COURT: No, I have this. Thank you, Mr. Kasner.
4 Which tab?

5 MR. SACCA: Tab 2 behind the 30(b)(6) tab.

6 THE COURT: Yes.

7 MR. SACCA: Is plaintiff's second amended objection
8 and responses to our 30(b)(6) notice. On page 14 of that, your
9 Honor, the first full paragraph speaks about the single-family
10 counterparty risk management department within Fannie Mae.
11 That was the department that was represented, that single-
12 family representative on the advisory team.

13 There is a sentence here, the third sentence of the
14 paragraph, which says, "Pursuant to the PLS risk policy, the
15 vice president of single-family counterparty risk management
16 also was responsible for ensuring that the whole-loan purchase
17 counterparty reviews are performed independently from PLS
18 counterparty reviews to avoid information sharing risk."

19 As best we understand it, your Honor, what they are
20 describing there are these operational reviews of loan
21 originators. What they have told us here is that the single-
22 family's operational reviews were somehow maintained separate
23 and distinct from the private label securities operational
24 reviews. But, your Honor, we have strong reason to believe
25 that that is not true, at least in all cases.

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1 If you look behind the Freddie Mac tab, your Honor, at
2 tab 6, there is a declaration of Cynthia Simantel.

3 THE COURT: S-I-M-A-N-T-E-L.

4 MR. SACCA: Yes. Ms. Simantel was a Countrywide
5 executive, a loan originating executive. In here, and I'm
6 particularly looking at paragraph 4, your Honor.

7 MR. SCHIRTZER: Your Honor, if I may interrupt, when
8 we received the documents last night, we did not get the
9 Simantel declaration. Is there a copy perhaps?

10 THE COURT: I think the same declaration is in the
11 Fannie Mae section, too.

12 MR. SCHIRTZER: I don't think we got it there either,
13 your Honor.

14 MR. SACCA: Your Honor, paragraph 4 of that
15 declaration talks about these annual audits conducted by the
16 GSEs and at least one instance where Fannie Mae was trying to
17 simultaneously and in close proximity schedule an audit by
18 their single-family side and an audit by their private label
19 side, and at Countrywide's request combined them.

20 If you look at Exhibit A to Ms. Simantel's
21 declaration, there is an email from Patricia Wolf at Fannie Mae
22 to Ms. Simantel and others at Countrywide where she says,
23 "Cindy, these reviews are related and should be tied together.
24 Thanks." So we know, your Honor, that at least on this one
25 occasion, I wouldn't be surprised if there were more, but at

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1 least on this one occasion the PLS and single-family originator
2 reviews were said by Fannie Mae to be related to each other and
3 tied together.

4 Looking back now, your Honor, at the responses to the
5 30(b)(6) deposition, on page 25, and this is addressing the
6 Freddie Mac side now, your Honor, there is a description of a
7 Freddie Mac information request. What it says here is that
8 individuals responsible for making purchasing or sales
9 decisions regarding private label securities were restricted
10 from receiving certain information regarding single-family loan
11 originators pursuant to Freddie Mac's information wall policy.
12 There is a citation to policy 7-115.

13 That document, your Honor, was submitted by the FHFA.
14 It is at tab 11 of their submission. That submission, your
15 Honor, at least reading it on its face, appears applicable only
16 to Freddie Mac employees trading in Freddie Mac's own
17 securities, not to traders in private label securities. So,
18 this does not appear to support what we were told in the
19 narrative response to our 30(b)(6) deposition that this
20 information policy prevented Freddie Mac from --

21 THE COURT: I have Exhibit 11 before me. If you could
22 repeat the statement you just made.

23 MR. SACCA: Certainly, your Honor. It is titled
24 "Information Wall Policy." You can look in a couple of places,
25 but at the tail end of the first paragraph, it says, "This

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1 policy prohibits using or the possibility that others may
2 perceive that we are using material nonpublic information
3 regarding Freddie Mac's mortgage and the purchase and sale of
4 those securities and secondary market transactions."

5 On the second page, under Roman numeral II, "Who are
6 restricted persons and how can I be sure I know the current
7 list? A restricted person is defined as someone whose job
8 responsibilities include purchasing and selling Freddie Mac's
9 mortgage securities in the secondary market." So this policy
10 does not appear, at least on its face, applicable to private
11 label securities transactions.

12 All to the point, your Honor, that we have reason to
13 believe, based on the information we put before you -- I know
14 others want to address this, and I don't want to take that
15 opportunity from them -- that there was substantial information
16 shared within both Fannie and Freddie of information between
17 the single-family side of the business that bought loans from
18 loan originators and therefore dealt with loan originators
19 literally many times a day, and the private label securities
20 side of the business that was buying securities backed by loans
21 issued by many of those same originators.

22 We have strong reason to believe that the information
23 that was exchanged included information about those
24 originators, how they were doing with regard to their
25 origination practices, and that information we think

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1 necessarily would have had to factor into the decisions to
2 invest in private label securities.

3 That is why we wanted to take the 30(b)(6) deposition,
4 your Honor, so that we could develop that record for you more
5 fully, to come before you at the appropriate time to argue
6 about what the proper scope of discovery is in this case. We
7 believe that it is manifestly proper to take discovery beyond
8 that of the particular people involved in these particular
9 securitizations because we think they were getting information,
10 at least their superiors were getting very relevant
11 information, from outside the PLS business, from the single-
12 family business. But we need to develop that better for you.

13 We have done, I think, the best we can with the
14 limited public record available to us. The best source of this
15 information would be from the FHFA itself. I think they have
16 already sort of conceded that by giving us this narrative. The
17 problem is that the narrative is not subject to cross-
18 examination, it is as yet unsworn, and it really answers
19 questions that they chose to pose.

20 We chose not to, your Honor, serve a deposition on
21 written questions or interrogatories. We chose to serve a
22 30(b)(6) deposition because we think from prior conferences
23 your Honor is in agreement with us that that is the most
24 efficient way to get at information like this.

25 THE COURT: I have an application on July 30th from

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1 the plaintiff that the defendants not be able to redepose, as I
2 understood it, a 30(b)(6) deponent on topics 1, 2, 10, and 11.
3 That's it.

4 MR. SCHIRTZER: That is a different issue, your Honor.

5 THE COURT: OK.

6 MR. SACCA: Your Honor, topics 1, 2, 10, and 11 dealt
7 with document preservation or destruction policies and document
8 maintenance, not this issue.

9 THE COURT: With respect to this issue, I understood
10 it was not a 30(b)(6) issue, it was an identification of the
11 document custodians and whether or not the defendants would be
12 able to obtain electronic discovery from document custodians in
13 the single- and multifamily business portion of the GSEs.

14 MR. SCHIRTZER: Your Honor, it is all three issues.
15 It is in part an issue of whether we have designated the proper
16 custodians, it is in part an issue of the scope of documents to
17 be produced and specifically whether documents that were purely
18 or solely on single-family and multifamily side need to be
19 produced. Then there is the issue of the defendants' request
20 for 30(b)(6) witnesses to go into custodial issues. So is all
21 three issues, your Honor.

22 THE COURT: This is Mr. Schirtzer speaking.

23 MR. SCHIRTZER: Yes, your Honor.

24 THE COURT: Before I hear from the plaintiff, is there
25 any other defense witness who has some additional point to make

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1 on these topics, or defense attorney?

2 MS. SHANE: Thank you, your Honor, very much. I'll be
3 brief.

4 I think Mr. Sacca rightly expressed the actual
5 procedural posture we are in. There has been an exchange of
6 requests both ways for additional custodians for various
7 reasons. The defense has added as many custodians or more than
8 the plaintiff has. We have much bigger numbers of custodians
9 than they have. That is what we were trying to get at with the
10 30(b)(6) and with other modest discovery devices, among other
11 things.

12 But it is correct that the 30(b)(6) is what we most
13 feel we need in order to properly streamline discovery, your
14 Honor, not to expand it, but to direct it at the places where
15 we most likely will find a very critical crossover kind of
16 information.

17 The comments that we have put in front of you, the
18 ones we have been able to amass, and some of the helpful
19 answers that have been given in response to the 30(b)(6),
20 albeit in written form, have pointed us to some very low-
21 hanging fruit. There were these committees. They had minutes.
22 They received reports. They met monthly. From what we are
23 able to tell so far, all of that would be extremely easy
24 material to produce.

25 What scares us, your Honor, and the reason we feel we

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1 need to further develop this, is because what the plaintiff
2 keeps articulating as the standard by which it will judge not
3 just the naming of custodians but the production of information
4 and documents, the provision of names of people at the agencies
5 or entities that dealt with the originators, it's all according
6 to this filter that if it didn't make it to the person who
7 decided to invest in the particular securitizations at issue,
8 persons we haven't yet had identified to us, but that small
9 subset, or the subset of people who happened to report to those
10 people, not to whom those people reported, then we will never
11 see that information.

12 The relevance standard both for purposes of
13 identifying these people and for answering interrogatories and
14 for producing documents someday is one in which only the very
15 lowest level of information appears to be coming our way.

16 They have now named as custodians some of these cross-
17 over people at higher levels, not nearly as many as we would
18 expect to see. There are people who have responsibility for
19 both divisions who still aren't on their list and who were in
20 this critical risk management function who still aren't on
21 their list.

22 We understand that even if they get named as
23 custodians, we have this relevance fight that has to do with
24 whether it made it to the decision-maker or someone who
25 reported to that decision-maker. That is what causes us to

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1 continue to feel that it is very, very important that we all
2 understand what the information is, how it flowed, and
3 therefore what would be reasonable ways to cut off the
4 discovery.

5 I will add that in addition to low-hanging fruit,
6 there are pieces of paper that we have found that suggest that
7 there were lower-level communications that we might well need
8 to try to find a way to efficiently explore, your Honor, in the
9 packet of demonstratives that your Honor has. They are in
10 addition to the joint reviews. We also have some email that
11 may be a little bit hard to decipher. This is number 6 in your
12 packet.

13 (Continued on next page)

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1 MS. SHANE: But it reads -- I am sorry. It's from a
2 Tony Holmes at Fannie Mae who we believe to be on the Single
3 Family side to a Chase representative who was dealing in whole
4 loans at the time. But what Fannie's person said was:

5 As I mentioned earlier, we have an axe for this
6 product as either whole loans or securities. Our whole loan
7 bid reflects our intercoupon spread multiples, depending on
8 your internal excess servicing multiples you may find an MBS
9 execution superior. If so, we're interested in bidding on your
10 pools once more. Please keep us in mind if you choose to
11 securitize this product.

12 So the same loan pools could have been taken by Fannie
13 and Fannie was interested in taking them either as whole loan
14 purchases on the Single Family side or in a PLS product that
15 ultimately becomes at issue in this litigation. And so we
16 would hope to be able to develop again by way of 30(B)(6) in
17 the first instance a way to get at those people who were on the
18 Single Family side who did, in fact, look at products or whole
19 loan opportunities for purposes of both whole loan and PLS and
20 may therefore have gotten even down to the whole level reviews,
21 your Honor, that could be sufficient to put the GSEs on notice
22 with respect to the particular defects.

23 There are documents in your packet, your Honor, that
24 reflect that they were doing loan level reviews of those
25 portfolios so that it would not necessarily only lead to the

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1 idea that they had a cleared idea that certain originators
2 might not have been performing under to their own standards and
3 have made them frivolous. But even the particular loans in the
4 pools did not need one verification or other and they were
5 getting to that level.

6 Thank you, your Honor.

7 MR. BENNETT: Ted Bennett, from Williams & Connolly,
8 for Bank of America and Merrill Lynch.

9 Hopefully, not to repeat anything that was covered by
10 the able presentation by counsel for UBS and for J.P. Morgan,
11 but I think it's important to emphasize that it's clearly
12 premature for the Court to rule at this point that we should be
13 foreclosed from taking this discovery for a couple of reasons.

14 First of all, although FIFA has provided us with
15 certain organizational charts for Fannie and Freddie, there are
16 a couple of drawbacks to those charts. First of all, they
17 don't cover the entire relevant period. But more particularly,
18 they don't cover all of the relevant areas. We've asked
19 several times for new charts. They have not been forthcoming.

20 And secondly, your Honor, although FIFA has provided
21 certain policies relating to the sharing of information across
22 functions, what they call a cross functional sharing or cross
23 functional processes, those too are mostly dated 2006/2007, the
24 latter half of relevant period. We simply don't have the
25 policies that were in effect at the beginning and prior to the

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1 relevant period.

2 But more to the point, your Honor, it's important to
3 understand that the intimate relationship that Fannie and
4 Freddie had with the originators, the very originators who are
5 at issue in this case and who plaintiffs claim had utterly
6 abandoned their underwriting guidelines.

7 Taking just one originator who is at issues in several
8 of the cases, Countrywide, Countrywide sold Fannie and Freddie
9 during the relevant period 11.1 trillion dollars -- trillion
10 with a "T" -- worth of mortgages. In fact, during that period
11 Fannie originated more than five thousand of its own securities
12 that were 100 percent made up of Countrywide originated loans.
13 Fannie and Freddie had people who were on campus at Countrywide
14 daily.

15 I commend your Honor to the declaration of
16 Ms. Simentel who was referenced earlier. She's a long time
17 Countrywide employee. She goes into some detail in her
18 declaration about these meetings, annual reviews, where they
19 came in for to and a half days and GSEs and looked at loan
20 levels, looked at performance, looked at procedure, looked not
21 just at policies that were in place but, actually, looked to
22 see how Countrywide was doing. And we know they did it not
23 just to Countrywide because if your Honor looks into the e-mail
24 that was referenced earlier attached to Ms. Simentel's
25 declaration, you'll see that just on that single trip they were

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1 also visiting other originators on the West coast who are at
2 issue in this case and some originators on the East coast who
3 are also at issue in the case. We know further from the
4 documents that have been introduced in the last few weeks, last
5 few days, rather, by FIFA, that Fannie and Freddie were
6 required by policy to do reviews of originators to whom the GSE
7 has had certain levels of exposure. So we know they were doing
8 these review. We know further from Ms. Simentel's recounting
9 of it how closely involved these reviews were with the very
10 practices that FIFA now complains about.

11 For example, your Honor, she mentions in her
12 declaration that they would look at loans that had been
13 purchased by Fannie or Freddie either as whole loans or as part
14 of securitizations. And at times they discovered that the
15 occupant didn't actually occupy the property and that led to a
16 discussion with Fannie and Freddie's representatives about
17 whether the loan had, nonetheless, been prudently underwritten
18 because at the time the originators and Fannie and Freddie had
19 an understanding that if the originator had done a pretty good
20 job of following the practice in the industry at the time that
21 the loan was prudently underwritten and it didn't need to
22 repurchase the loan from Fannie and Freddie even if it was an
23 occupancy misrep.

24 Also mentioned in Ms. Simentel's declaration are
25 issues relating to LTD and issues relating to how the

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1 underwriting guidelines were being practiced. So it's not
2 hypothetical exercise of maybe Fannie and Freddie knew those
3 things. We know they knew these things. And we know they knew
4 them not just on whole loan side but on the private label side.
5 And we know that they shared information across either through
6 the PLAT at Fannie or through Freddie's Enterprise Risk
7 Management Committee.

8 We know all those things. And we know that they
9 spotted issues with some of the originators. But we don't know
10 because FIFA refuses to give us the discovery is what is in the
11 files of people who did those reviews. Now FIFA argues --

12 THE COURT: What do you mean? Which people who did
13 what reviews?

14 MR. BENNETT: The people at Fannie who did the reviews
15 of the originator.

16 THE COURT: On the Single Family side?

17 MR. BENNETT: Yes, your Honor. I'm not sure we have
18 it from the people who did it on the PLS side as well.
19 Certainly, the people who are mentioned in Ms. Simentel's
20 declaration mentioned in the e-mail, a couple of those are
21 custodians. The vast majority are not. We simply don't know
22 whether we'll ever see those people's documents.

23 But, your Honor, imagine a document in the files of a
24 whole loan person at Fannie that says Option One is a den of
25 thieves. Nobody should ever buy a mortgage from Option One.

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1 According to the way FIFA sees it we should never get that
2 document. Even if it flowed to the PLS but didn't somehow end
3 up -- PLAT, even if it flowed to the PLAT but didn't somehow
4 end up in the files of one of the few custodians they've named
5 at Fannie. So we know that if it ended up in the files of
6 someone at Freddie that there's a very good chance that it was
7 destroyed because they have a random document destruction issue
8 at Freddie. So what we need to do is cast a wider net to go
9 look at the files of people on the Whole Loan side and see what
10 documents are there because we simply can't trust the
11 production on just the PLS side to pick all of those documents
12 out, even the ones that were communicated.

13 Now, your Honor I have been framing this all on terms
14 on the way FIFA argues the law --

15 THE COURT: You don't need to address that.

16 MR. BENNETT: You'd like me not to address the law,
17 your Honor?

18 THE COURT: Mr. Williams, thank you. I said you
19 didn't need to address that.

20 MR. BENNETT: Case. Would you like me to address
21 other causes we've cited, your Honor? We've cited the Norbank
22 case and also the Davison Pike case which are also extremely
23 informative on the issue of justifiable reliance which of
24 course is the burden of the plaintiffs to prove. And these
25 documents even if they weren't in the hands of people who made

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1 the decisions on the loans are critical to the issues of
2 justifiable reliance which is the plaintiff's to prove. I'd be
3 happy to address that, your Honor, if your Honor would like.

4 THE COURT: I don't think I need that right this
5 month. Thank you so much, Mr. Williams, for that offer.

6 MR. BENNETT: The last thing I would venture, your
7 Honor, there's been a number of years that have passed, more
8 than eight years have passed since these loans are originated.
9 We heard today about how the loan files have gone many
10 different places. Well, there's been tremendous turnover
11 within the GSEs as well. There's been turnover. There's been
12 document destruction for a number of years. We would urge the
13 Court in light of those facts to cast as broad a net for
14 discovery as possible, at least to allow us the 30(B)(6) we
15 need to identify the custodians and beyond that to allow us to
16 explore these documents that are relevant for not just the
17 knowledge defendants under Section 11 and plaintiff's burden of
18 proving knowledge, no knowledge under Section 12 or also
19 justifiable reliance under the D.C. Blue Sky law and the
20 plaintiff's broad claims to bring against a number of the
21 defendant's here, your Honor. Thank you.

22 THE COURT: Is it, Mr. Sacca?

23 MR. SACCA: Yes, your Honor.

24 THE COURT: Mr. Sacca, I just am still trying to
25 figure out the precise issues that you need a decision on

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1 today. And I had spent some time with the parties' submissions
2 which through my fault entirely were limited in number of
3 pages. You want a 30(B)(6) deposition?

4 MR. SACCA: I think, your Honor, the crucial issue
5 that we would like resolved today is whether we are entitled to
6 a 30(B)(6) to inquire further into these issues of what
7 information -- your Honor, just begging your indulgence, page
8 10 in the slides I think will give your Honor maybe a better
9 sense than I did initially of exactly how all of this works.
10 This is a blow-up, your Honor, of a Freddie Mac organization
11 chart that is in whole in the binder. But what we're trying to
12 intend to show you by this part that we've pulled out and
13 highlighted the reporting lines on, your Honor, is that both of
14 these businesses, Single Family and PLS, are in the same
15 reporting -- to an executive one below Freddie Mac's chairman
16 and CEO.

17 Your Honor, these businesses both reported to the
18 same -- executive. It was executives at the highest levels of
19 these companies that were both making the decisions to invest
20 in private label securities and that were responsible for the
21 Single Family side of the business. Information we know from
22 both of those businesses went to those people who are sharing.
23 What we need to look into and what we want the 30(B)(6) for is
24 to figure out exactly what that information was so that we
25 could come to your Honor on a more fully developed record to

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1 talk about the appropriate scope of which custodians we should
2 search and for what.

3 I'm sorry, your Honor. I know that was a very long
4 answer to you are question.

5 THE COURT: And with respect to the 30(B)(6) request,
6 which once of the 30(B)(6) were you denied -- I know there have
7 been 30(B)(6) depositions.

8 MR. SACCA: Yes.

9 THE COURT: So which specific items that are subject
10 to your 30(B)(6) demand do you want to take a deposition for?

11 MR. SACCA: Items three -- three is probably the
12 principle one, your Honor. That's the one that we have the
13 narrative and response to. I think -- right -- all of the
14 topics I guess, your Honor, the easiest way to say it is I
15 guess all of the topics except one, two, ten and 11 which
16 they've already provided testimony. And they all relate, your
17 Honor, in one way or the other to this issue of flow of
18 information and the information coming in to Fannie and
19 Freddie.

20 THE COURT: So with respect to FHFA's July 30th letter
21 in which they ask that there be no redeposition of a 30(B)(6)
22 witness on topics one, two, ten and 11, you're consenting to
23 that?

24 MR. SACCA: No, your Honor, we're not. But that's no
25 this issue, I guess is the way I would answer that. And

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1 Mr. Woll I think is prepared to address that separate and
2 distinct issue, okay.

3 THE COURT: OK. Then I'll just put that aside. Your
4 principally interested in Item Three.

5 MR. SACCA: Three I think is maybe the most
6 significant of the topics.

7 THE COURT: Let me read that. It's on page 6 at
8 Exhibit 2?

9 (Pause)

10 MR. SACCA: You are reading -- I am sorry, your Honor.
11 It's Exhibit One to our submission is the 30(B)(6) notice
12 itself.

13 THE COURT: I am reading the plaintiff's objections
14 and responses to Defendant's Notice of Rule 30(B)(6)
15 deposition. Let me see if I can get a date for you. Dated
16 July 10th.

17 MR. SACCA: That would, I think, restate the topic,
18 your Honor.

19 THE COURT: Okay. Thank you very much. That's
20 helpful.

21 Mr. Schirtzer.

22 MR. SCHIRTZER: Your Honor, because the nature of
23 defense presentation a lot of different points of information
24 were thrown out, I am going to rather than try to respond point
25 by point, try to put some structure on my response. And I am

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1 glad we finally, actually, got to a specific discovery request
2 because the reason that we have objected is because of the
3 nature of the specific discovery request that have been thrown
4 at us which I'm going to address in a moment.

5 But just as a place holder, a very substantial amount
6 of what you heard from defense is simply based on the belief
7 that we have not adequately done the job that we are required
8 to do as counsel and that our client is required to do under
9 the rules to identify proper custodians and that is manifestly
10 false as I hope to demonstrate, your Honor.

11 So let's talk about the discovery requests themselves
12 and there's a short little history here. This all started with
13 the interrogatories that defendant served before they served
14 any 30(B)(6) notice. And what they wanted in Interrogatory No.
15 3 was the identity of all persons employed by you or acting on
16 your behalf who participated in, were involved in, approved or
17 were responsible in any way for the GSE's relationships
18 including his purchaser of loans with any mortgage are
19 originator disclosed in the prospectus supplement for the
20 securitizations. Please, specify which person had
21 responsibility for which originators.

22 As I am sure your Honor understands, the fact that the
23 originators were part of the securitization was not a limit on
24 what they were asking for on Interrogatory No. 3. So, for
25 example, if Countrywide was an originator on one of the

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1 securitizations or Option was an originator one of the
2 securitizations, then they literally wanted every person who
3 ever interacted with Countrywide or with Option One including
4 what responsibility they had with respect to Countrywide or
5 Option One.

6 We said to them in enumerable meet and confers, this
7 is way too broad. This is essentially our entire organization,
8 however many thousands of people work at Freddie Mac and Fannie
9 Mae other than the back office people and even some of them all
10 have some kind of dealing with originators, the business we are
11 in. So we asked them to narrow that interrogatory. And we
12 told them that if they narrow that interrogatory we would be
13 happy to answer. They refused to narrow the interrogatory.
14 Instead, what they did was serve the 30(B)(6) notice. The
15 30(B)(6) notice was not much of an improvement on the
16 interrogatory. Your Honor has already looked at Topic Three of
17 the 30(B)(6) notice which has multiple subparts and,
18 essentially, asks for much of the same information in
19 Interrogatory No. 3.

20 Let's look at, if we may, Topic Four and Five of the
21 30(B)(6) notice which, if your Honor is still looking at the
22 objections and responses, Topic Four is on page 25, the
23 composition of each group.

24 THE COURT: Well, I have page 7 so.

25 MR. SCHIRTZER: I believe you are now looking at the

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1 30(B)(6) notice themselves. So if you have Topic Four that's
2 fine. The deposition of each group responsible for any aspect
3 of your purchase or mortgage loans including your due
4 diligence --

5 THE COURT: Slow down.

6 MR. SCHIRTZER: Your communications with mortgage loan
7 originators, your pricing decisions, your monitoring of the
8 performance of mortgage loans and your communications with any
9 third parties including but not limited to operational reviews
10 of third party in connection with a mortgage loans or your
11 purchase of them from the time period January 2004 to September
12 2007.

13 And I won't read the entirety of Topic Five but it is
14 similarly broad and similarly infirmed. And so we said to them
15 again in innumerable meet and confer sessions that in essence
16 what you are asking for is an identification of almost
17 everybody who has any operational responsibilities at Freddie
18 Mac or Fannie. And we have and we will identify the custodians
19 who in any way touched on the what we call the private label
20 securities business. And if they happen to be Single Family
21 people who touched on the private label securities business, we
22 will identify them as well and indeed we have.

23 Now we come to the misunderstanding part of
24 defendant's presentation. I heard repeated references to the
25 fact that there is a PLAT at Fannie Mae, a high level committee

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1 and there is a corollary committee at Freddie Mac. Your Honor,
2 we have designated as custodians 11 members of the PLAT and
3 members of enterprise risk management at Freddie Mac. We have
4 also identified -- and this is the handout that I've provided
5 to the Court at the beginning of the day. We've given the
6 identity, the title, the business unit and the responsibilities
7 as they relate to PLS of the 82 custodians we have named.
8 These custodians, your Honor -- and I assure you because I was
9 very much involved in the process of identifying them -- these
10 custodians cover the field of business responsibilities. They
11 cover the field of the documents that the plaintiffs claim they
12 ought to be getting, and indeed, many of which they will be
13 getting, although, they don't seem to believe that.

14 Let me add two features that are particularly germane
15 to why no more custodian -- let me take a step back.

16 So the reason we provided a written response to the
17 30(B)(6) notice as opposed to producing a witness was because
18 it was a monumental effort on our part to try to gather all of
19 the information just to respond to Topic No. 3 and to make sure
20 it was accurate. It involved the efforts of many people of
21 Quinn Emmanuel and many people the client end, phone calls,
22 checks of computer records. It was a very substantial
23 undertaking. And as I said to defendants again in meet and
24 confers before we provided a written response, the written
25 response, frankly, contained far more information than any

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1 witness I could have put in a chair would have been able to
2 offer on the subject of custodians. But at the end of the day
3 the important thing to understand is that the 30(B)(6) topics
4 on which they now seek to compel a witness are solely to
5 identify additional custodians. That is why they want to take
6 these 30(B)(6) depositions because they believe the 81 custodians we
7 have named to date are not enough and they want more of their
8 list of 164 custodians to be added to the list.

9 And, your Honor, we submitted as part of our
10 submission the various letters that we got from defendants as
11 to the reasons why these additional 164 custodians were
12 supposedly proper.

13 Let's talk about UBS since their counsel stood up. In
14 many instances what UBS told us with respect to their proposed
15 additional custodians was, essentially, that they had looked at
16 our organizational chart and that these custodians corresponded
17 to a functional bucket that they believed would have relevant
18 information.

19 Notwithstanding, the paucity of that justification for
20 additional custodians, we took each and every name and fully
21 vetted them with the client, with in-house counsel, with the
22 people working in the business units to identify whether these
23 people were or were not proper custodians. And as a result we
24 have added an additional 17 custodians and we are still
25 considering adding more custodians because some of these

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1 letters came in quite recently. But the bottom line, your
2 Honor, is that as I hope the handout I've provided
3 demonstrates, the custodians we have named do cover every
4 essential function, including the functions that defendants
5 were talking about just moments ago. The PLAT is covered.
6 Enterprise Risk Management is covered. The operational --
7 sorry -- the reviews of seller services. The people who sat
8 above that task are covered.

9 Indeed, your Honor, there's another fact which
10 defendants don't seem to have taken from our written response
11 which is critically important and it has to do with the way
12 documents are maintained at Freddie and Fannie Mae. At Freddie
13 Mac people have access to directories. And depending upon what
14 business unit you're in, you have access to directories in that
15 unit. But the higher up the chain you go, the more directories
16 you have access to.

17 So when we designate for them Don Bisenius who is a
18 very senior executive.

19 THE COURT: Can you spell that?

20 MR. SCHIRTZER: B-I-S-E-N-I-U-S. He was the Senior
21 Vice President of Credit Policy and Portfolio Management.

22 He had as a result of his position, access to
23 everything in Single Family control and Single Family credit
24 and the entire counter-party credit risk directory. We name
25 Patty Cook, also a very senior executive. She had access to an

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1 extraordinary amount of information. So when I say that these
2 custodians covered the field, they will, in fact, capture all
3 of the types of documents that defendants say they know are out
4 there and demand to see.

5 And just as an example, I asked the clients to provide
6 me with a list of the sorts of documents that are already being
7 captured. I am sorry. Let me go back. Fannie Mae has a
8 different system. Fannie Mae has a system of shared drives
9 that people different people have access to. And the client
10 has identified for me something like 25 different shared drives
11 which we are in the process of reviewing for documentation.
12 And the kinds of documents we're going to see in those share
13 drives are PLS counter-party annual reports, PLS credit trend
14 reports, risk analysis reports, credit risk committee minutes,
15 credit risk committee presentations, PLAT meeting minutes, the
16 very thing the defendants were talking about, PLAT risk
17 policies and there's about 20 other things on this list and,
18 similarly, at Freddie Mac the kinds of documents that are our
19 existing custodians are going to capture our report on site
20 visits and originating evaluations, counter-party credit risk
21 reports, letters, proof seller lists, the kinds of things that
22 they claim they need.

23 Let me correct another misunderstanding on the part of
24 defendants. They seem to think that the only documents they're
25 going to get are the documents that were given to the traders

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1 or the people who work for Lota. That is a misimpression on
2 the part of defendants. What we said in our submission and I
3 thought it was clear but let me make it clear is that
4 defendants are going to get the documents that were considered
5 in connection with the PLS purchases, the purchases at issue in
6 this litigation. Those will be the documents in the possession
7 of the traders but it will also be the documents that people
8 who were required to give those traders information had in
9 their possession. And so if a supervisor of the traders had in
10 his possession a document which showed hypothetically that
11 Option One was not an approved originator, that document will
12 also be produced.

13 So between the combination of the very elaborate and
14 fulsome custodians that we have identified and the documents
15 that those custodians have access to, defendants are going to
16 get everything about originators that made it over to the PLS
17 side and was considered in connection with the decisions to
18 purchase or not purchase these particular securitizations.

19 Now, I don't want to suggest that there isn't any
20 fundamental issue between us because there is at the end of the
21 day a fundamental issue. What they're not going to get is the
22 documents that were considered only on the Single Family side
23 and related only for the Single Family business. And we are
24 not giving them custodians who were cabined on the Single
25 Family side. And the reason we're not doing that is, actually,

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1 stems from your Honor's earlier order in connection with the
2 statute of limitations.

3 As your Honor rightly pointed out there, this is not a
4 case about whether the originators had dubious underwriting
5 practices generally. This is a case about whether the
6 defendants failed to act diligently to ensure consistent with
7 the representations in the offering materials that the
8 originators' questionable practices did not lead to the
9 inclusion of nonconforming loans in the particular
10 securitizations sold to GSEs. So if documents pertain solely
11 to Single Family originations and, for example, that could
12 include every repurchased demand ever issued by Freddie Mac or
13 Fannie Mae on any loan every sold to them by any originators
14 who happens to be an originator on securitization, at that
15 level of granularity, no, they're not going to get those
16 documents. They are not entitled to those documents. Those
17 documents are not relevant to what is in dispute here.

18 But if Option One is disapproved as a seller servicer,
19 that list goes to the PLS people. Counter-party risk reports
20 on Option One at Countrywide go to PLS and get considered in
21 connection with the purchasers. And they're going to get all
22 of that.

23 So now let's first circle back to the need for a
24 30(B)(6) deposition on this.

25 If the defendants would, actually, look at the list of

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1 custodians that we have already designated, as I say we are
2 still considering more and understand their functions as we had
3 explained it to them in the written response, and now with the
4 additional understanding of the scope of documents that these
5 custodians had, they will understand that, in fact, adding
6 additional custodians in the same departments will not garner
7 them any additional documents, that adding custodians who
8 worked solely on the Single Family side had nothing to do with
9 the PLS side will not produce relevant -- and consequently if
10 what they want the 30(B)(6) deposition for is to confirm the
11 effort that we undertook to put this document together, all I
12 can say, your Honor, is that no witness that I could prepare
13 will have more information than we were able to garner and put
14 into the written response. What I expect is the case is that
15 they really want the 30(B)(6) deposition to try to get
16 information that always remained on the Single Family side and
17 was germane to the Single Family side, well, then that'
18 information that they're simply not entitled to, your Honor,
19 and this a fundamental dispute that's going to run across
20 interrogatories, 30(B)(6) depositions and document requests.

21 THE COURT: Thank you for your presentation.

22 Let me ask you about this phrase, a document
23 considered in connection with PLS purchases. If the document
24 came before the risk committee at one of the two GSEs how do
25 you know it was considered in connection with PLS purchases?

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1 MR. SCHIRTZER: Well, because there are a number of
2 PLS people on that risk committee. So if a document, for
3 example, in one of these PLS site audits at Countrywide, those
4 documents would have made their way up to one of the risk
5 committees. They would have necessarily been considered in
6 connection with the PLS purchases and we're going to produce
7 them.

8 THE COURT: Okay. So if the document itself doesn't
9 have to indicate that it's prepared for the purpose of being
10 considered on the PLS side if it came before the Risk Committee
11 which had shared membership and discussed the performance of
12 originator, it will be turned over.

13 MR. SCHIRTZER: There is one exception, your Honor,
14 and that is the -- there was a reference before to site visits
15 and I think this is at Fannie May. And they did -- it is true
16 that they did them in close proximity so there would be a
17 Single Family audit, then a PLS audit. But, in fact, in one of
18 policies that were submitted to your Honor to explain the
19 information laws, in fact, the information regarding the Single
20 Family site visit was not shared with the PLS. In fact, it was
21 not shared pursuant to policy.

22 THE COURT: So it didn't make it to the risk
23 committee?

24 MR. SCHIRTZER: Doesn't make it to the PLS side.

25 THE COURT: So it's at the Risk Committee but it's not

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1 shared with the PLS members of the Risk Committee?

2 MR. SCHIRTZER: Your Honor, I understand the question
3 and I don't know the answer, so I don't want to misrepresent.

4 THE COURT: So good. Why don't we flag that as an
5 issue.

6 MR. SCHIRTZER: Now, your Honor --

7 THE COURT: When are you making your document
8 production?

9 MR. SCHIRTZER: That's a question I need to ask
10 Ms. Chung.

11 MS. CHUNG: Well, your Honor, the review is all
12 underway and we are on target as I think everyone in this room
13 is to produce by the end of September. Certainly, we
14 anticipate making productions up to that date.

15 THE COURT: When do you think you will make a
16 substantial production with respect to these custodians that
17 we're talking about today?

18 MS. CHUNG: Well, your Honor, there we started with a
19 quarter list and in response to considering the defendant's
20 proposals we've expanded that list considerably. So some of
21 those custodians are being loaded into new process as we seek.
22 So I can't say it's going to be that they get all of these cuss
23 custodians at the front end of the role in process. I think it
24 will be some custodians come out and then others come out and
25 we're on track to get it all done by the end of September.

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1 THE COURT: So we're about to move into August. Will
2 the defendants get some of this production in August?

3 MS. CHUNG: I think so, your Honor. I don't want to
4 represent that it's going to be a significant amount but I
5 think that everyone is finding it a challenge. So most of it
6 will be through September. But there is material now in the
7 pipeline being used and being sent out so, yes, we will make
8 some production. I don't want to overstate the situation
9 because I think that there is -- we have a considerable number
10 of documents to review. We are undertaking to do it the old
11 fashioned way on our side and so we need to get through those
12 and produce them and I do think very much of it will be in
13 September, not in August.

14 THE COURT: I have one more question for you,
15 Mr. --oh, I'm sorry.

16 MR. SCHIRTZER: Your Honor, I was just standing to
17 address the question.

18 THE COURT: No. It was for Mr. Sacca.

19 MR. SCHIRTZER: Did I do it again?

20 THE COURT: Yes. I wanted to know if the defendants
21 or at least UBS has decided at this point that it would like to
22 brief the substantive law with respect to knowledge with
23 respect to Section 11. And I ask that question because of
24 Footnote Two on the defendants' submission for the July 31st
25 hearing and an undated letter that I think I got on the 30th.

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1 And this was a topic that we talked about at the May 14th
2 conference and at pages 25 to 26 in which I offered to have
3 early motion practice on the standard for knowledge for Section
4 11 claim. And at that time the thinking, as I understood it,
5 on the defense side was, no, it'd be too fact intensive a
6 question and would not be meaningful, helpful in the way that
7 I'd anticipated to have that legal discussion now.

8 Have the defendants changed their mind?

9 MR. SACCA: Your Honor, we have not. I think we still
10 would welcome the opportunity to brief that after we have had
11 the chance to develop a more full record for your Honor, part
12 of which would be the 30(B)(6) deposition, part of which would
13 probably be documents we get in production after that.

14 Your Honor, to respond very briefly to what
15 Mr. Schirtzer said, we saw the 30(B)(6) depositions. The
16 partys are agreed on that. We did for a reason, your Honor. A
17 narrative is all well and good for whatever limited purposes
18 but I can't cross-examine a narrative. I can't ask the
19 follow-up questions of a narrative and I can't ask clarifying
20 questions of a narrative. And we've seen plenty today to tell
21 us that we shouldn't take everything that's in this narrative
22 at face value. Mr. Schirtzer just said that where there were
23 counter-party reviews done by Single Family and done by PLS
24 they made an effort to strip out information. We've seen an
25 e-mail though that said that they did this review together at

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1 Freddie's choice to put the Single Family and the PLS review of
2 Countrywide together where, obviously, both sides were going to
3 hear whatever Countrywide had to say.

4 Now, your Honor, I also will note that many of the
5 Fannie people on that very e-mail about the Countrywide
6 operational review are not on the custodian. Also missing from
7 the custodian's list, your Honor, Freddie's CEO, Mr. Syron.
8 Freddie Exhibit 4 in the binder in front of you which I made
9 reference to before the Special Litigation Committee's report
10 says on pages 16 to 17, although Freddie Mac had been involved
11 in the subprime market prior to Mr. Syron's joining the company
12 and even prior to 2000, the senior management under Mr. Syron
13 increased the company's involvement in that market. The person
14 responsible for Freddie's decision to take on more subprime
15 securities largely through PLS isn't on the custodian list.

16 So, your Honor, again, we're not after more, per se.
17 We're after the right ones. And we have been deprived up till
18 now of the opportunity to ask questions that we think are
19 necessary to decide who the right ones are. Your Honor has
20 raised some very good questions that we would like answers to
21 about if certain information reached the Private Label advisory
22 team. Do they consider to have been passed on or not? We
23 think this they have the amputation standard on its head. We
24 think under the third restatement of agency information is
25 imputed unless there's a duty to share it.

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1 But, your Honor --

2 THE COURT: Let me ask you, on this ten page list of
3 the document custodians, are there people who you think should
4 not be on that list?

5 MR. SACCA: We don't know yet entirely, your Honor. I
6 am not -- it is possible that there are people that we after we
7 learn a little more would think are not necessary. Like I
8 said, judge, I can't stress this enough, we're not out simply
9 to increase the number of custodians. We want to make sure we
10 have the right ones.

11 THE COURT: Okay. Thanks.

12 MR. SCHIRTZER: Actually, your Honor, the example that
13 was just offered is almost too telling. They want Dick Syron,
14 the former CEO and chairman of Freddie Mac. And their basis
15 for wanting him is a couple of SEC complaints that claim that
16 he essentially led Freddie Mac into an overconcentration of
17 subprime and didn't disclose it was the gist of the SEC
18 complaint.

19 What they don't say is that Don Bisenius and Patty
20 Cook, the operational executive vice presidents or whatever
21 titles were immediately below him, were also defendants in that
22 same case and they're both custodians on our list which proves
23 the point I am trying to make, that we have gone to the top
24 levels of the company, the people who had access to directories
25 that will encompass all sorts of information. And we've put

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1 those people on custodian lists. To say that we need a
2 30(B)(6) deposition to identify an apexed opponent that's -- it
3 is what it is, your Honor.

4 THE COURT: Okay. Thank you. We're going to take a
5 brief recess. I want counsel to talk about the late August
6 date and whether an order in connection with that would be
7 helpful and whether or not reports, status reports on document
8 production late August before such a conference would be
9 helpful. I need the parties' guidance and if you could discuss
10 that together. We'll take a ten minute recess.

11 (Recess)

12 (Continued on next page)

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1 THE COURT: Mr. Bennett, I understand I kept calling
2 you Mr. Williams.

3 MR. BENNETT: Yes, your Honor.

4 THE COURT: I apologize.

5 MR. BENNETT: That's quite all right, your Honor. The
6 "Edward Bennett" gets people confused all the time.

7 THE COURT: Someone earlier today mentioned that I was
8 going backwards. I'm going to do that again. I'm going to
9 revisit our first topic.

10 I think we should keep it simple. We should have the
11 Daubert motion addressed just to the protocol in the UBS case,
12 briefed by FHFA and UBS on roughly the schedule that the
13 plaintiffs proposed -- august 9th, August 31st, September
14 13th -- understanding that counsel will discuss the appropriate
15 schedule with each other that accommodates vacations and other
16 personal needs and get me a letter describing what schedule
17 they would like me to endorse. Then, any other defendant who
18 wishes to bring a similar Daubert motion based upon the
19 plaintiff's sampling protocol in their case may during the fall
20 talk with Mr. Selendy about a schedule. Write me and let me
21 know what your desires are.

22 Again UBS gets the great honor and privilege of being
23 the stalking-horse on the issue for everyone.

24 MR. KASNER: I would say thank you, your Honor, but
25 given my vehemence in reaction, I will sit mute.

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1 THE COURT: I appreciate Mr. Sacca helping me focus on
2 precisely what relief is being sought with respect to the most
3 recent issue we have been discussing. To the extent the
4 request is for a 30(b)(6) deposition on item 3, that request is
5 denied.

6 I think that I can make a couple of observations here
7 beyond simply saying that request is denied that may have
8 broader implications and, hopefully, helpful guidance for the
9 parties. I think that specific request was just one of a
10 constellation of issues about the adequacy of FHFA's document
11 production and the number of custodians and the identity of the
12 custodians.

13 Let's step back and ask what this discovery of the
14 plaintiff is all about. To some extent I'm going to share
15 these thoughts because if you think I see things incorrectly, I
16 think it is important that you hear the way I'm thinking so you
17 can correct my thinking. Mr. Bennett, that even means pointing
18 out some law to me on occasion.

19 I don't think a defendant can proceed to trial here
20 unless a defendant believes they can successfully defend the
21 section 11 claim. I know there are these other issues in the
22 case, other claims of federal securities law violations and
23 fraud claims, but I think it is hard for a defendant to proceed
24 to trial unless they think they have a good defense on the
25 section 11 case.

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1 The role of knowledge in a section 11 claim is a
2 limited one. Over and over again the arguments by defense
3 counsel to me this afternoon have talked about how information
4 from the single-family side of the enterprise was necessarily
5 shared with the PLS side and therefore necessarily appropriate
6 for discovery in this case.

7 The theme of the defense arguments has not been that
8 information held solely within the single-family side of the
9 business should be discoverable. The fear is that the document
10 production that is being undertaken by the plaintiffs will be
11 inadequate to capture information principally about originators
12 that was shared with the PLS side. I don't find any basis to
13 believe that that is a realistic fear.

14 First of all, the FHFA is making a massive production
15 here. As its description of the roles of the various
16 custodians that it has already agreed to make shows, they
17 represent many different functions within the GSEs, including
18 on the risk committees that were so much the focus of
19 discussion with me today.

20 If there was, as the defendants argue, a tying
21 together of the single-family and PLS function within these
22 organizations and substantial information sharing between the
23 two sides of the businesses within these organizations, and I
24 think I'm capturing the precise terms used this afternoon,
25 those documents are going to be captured in this document

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1 production. If they aren't, come on back to me.

2 There is no basis to argue now or to fear now that
3 they won't be produced. And that is before I even get to the
4 level of analysis that rule 1 would require me to undertake and
5 a proportionality analysis, weighing the role that a knowledge
6 defense is going to have in this case with the kind of
7 intensive undertaking that FHFA is making and that the
8 defendants are each going to be burden by.

9 I think Mr. Sacca had a good point. He said it's not
10 the number, it's the quality. And that's true. Everybody has
11 to spend money looking at whatever is produced.

12 I find that FHFA's production of a written response
13 was to be commended. It was a much more reliable presentation
14 of extremely complex matters, more reliable and more detailed
15 than could have been received in any 30(b)(6) deposition under
16 any time frame that could have been considered reasonable.

17 I don't have a request from the defendants that is
18 pinpointed. There has been only one name mentioned here of a
19 custodian that should have been included and wasn't. I take
20 that as a tribute to both sides here and the meet and confer
21 process, and also in recognition that FHFA is taking its
22 responsibilities seriously, that when it needs to reconsider a
23 particular custodian, it's thinking about that and keeps adding
24 when it finds it's appropriate to do so.

25 These are layers of reasons which support each other

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1 for my ruling.

2 MR. BENNETT: Your Honor?

3 THE COURT: Yes?

4 MR. BENNETT: I wasn't clear. We certainly are
5 arguing that documents that never went, if there are any, never
6 went from the home loan side to the PLS side are relevant, for
7 a number of reasons.

8 THE COURT: We have finished argument on that issue.
9 It's late. Thank you so much, but those documents I will not
10 order produced for all the reasons I have just described.
11 Thank you.

12 MR. BENNETT: Thank you, your Honor.

13 THE COURT: Counsel, the two exhibits that you gave to
14 me today, I want to make sure that all the materials that we
15 have considered this afternoon in addition to these two
16 handouts -- one, the custodian list, and the other the
17 collection of documents that begins with an excerpt from a Form
18 10-K -- if you could give me another set so I can make sure
19 that everything is appropriately filed.

20 MR. KASNER: Your Honor?

21 THE COURT: Yes, Mr. Kasner?

22 MR. KASNER: I'm not here to reargue, I assure the
23 Court. I just wish to place on the record so your Honor knows
24 that the issues as to which discovery was being sought that we
25 discussed today do not relate solely to the issues of actual

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1 knowledge.

2 I understand why your Honor focused on the section 11
3 claim, which perhaps may impact the component of knowledge a
4 bit differently than the affirmative element in a section 12
5 claim, for example. However, there are other aspects of the
6 defendants' defenses I wish to advise the Court to which this
7 discovery relates. I assure the Court I'm not here to reargue
8 your Honor's ruling.

9 Issues of materiality are impacted by what is in the
10 files that we were seeking, in the 30(b)(6) information that we
11 were seeking, information with respect to reliance for those
12 fraud defendants -- I am not one.

13 THE COURT: Yes.

14 MR. KASNER: -- and issues related to inquiry notice
15 with respect to the statute of limitations we believe will all
16 be impacted by those issues, your Honor, not simply actual
17 knowledge.

18 THE COURT: Yes, I understand that. I hope you
19 weren't misled by my frank sharing of an analysis which was
20 just one and not a necessary component to my ruling.

21 MR. KASNER: I understood, your Honor.

22 THE COURT: I would have ruled the same way without
23 any reference to the knowledge component of the section 11
24 claim.

25 MR. KASNER: I understood that, your Honor. Your

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1 Honor had indicated that that was your Honor's belief about the
2 centrality of that component to our defenses. I just thought
3 it was important to make plain on the record it's not just that
4 issue. I understand what the Court is saying.

5 THE COURT: The third paragraph in your submission of
6 I believe July 30th lists a number of those other elements or
7 the way knowledge relates to elements of a variety of claims
8 and defenses. I did read that with care and I am well aware of
9 it.

10 MR. KASNER: Thank you, your Honor.

11 THE COURT: I have what I thought was the 30(b)(6)
12 issue in a set of letters raised in the first instance I think
13 by FHFA with respect to four separate questions and a request
14 that the 30(b)(6) witness not be redeposed. I believe someone
15 wished to address that for the defendants.

16 MR. WOLL: Yes, thank you, your Honor. David Woll for
17 the defendants. As you noted, the plaintiff raised with the
18 Court issues we had with the adequacy of two witnesses that
19 were produced to testify with respect to, generally speaking,
20 document retention issues. We submitted something this morning
21 in response to that.

22 We do have issues with respect to the adequacy of the
23 30(b)(6) testimony on the document retention issues, but the
24 fundamental issue I want to focus on is the Freddie Mac
25 document destruction issue because I think it impacts really

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1 everything we have been talking about today in terms of
2 custodians and scheduling.

3 To briefly summarize, and I know it's late, the
4 plaintiffs originally brought to our attention that Freddie Mac
5 employed an automatic deletion protocol originally described to
6 us as having been in place at least from January 2004 to
7 September 2008. They told us during the week of June 29th,
8 when we were talking about document custodians, that as a
9 result of that protocol, basically any email that wasn't
10 affirmatively saved for an employee prior to September 2008
11 didn't exist anymore and any emails to an employee who left
12 prior to 2008, those emails also wouldn't exist anymore, even
13 if they had been affirmatively saved, because they would have
14 been affirmatively discarded at the time of departure.

15 Obviously, it is pretty fruitless to talk about
16 document custodians if they don't have any documents. We
17 thought it important to bring this to the Court's attention
18 right away, which we did in a letter from Mr. Kasner on July
19 2nd. Counsel for the plaintiff responded, noted that they had
20 brought this to our attention because it was relevant to
21 document custodians and discovery, and said in that letter,
22 quote, "FHFA will continue to work in good faith to resolve any
23 outstanding issues regarding e-discovery and to exchange
24 information with defendants that bears on that effort." That
25 sounded pretty good.

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1 We wrote a letter to the plaintiff on July 5th. I
2 wrote that letter. Other letters followed on July 12th.
3 Suffice it to say there were numerous requests to plaintiff to
4 try and get to the bottom of this issue, which fundamentally is
5 to what extent are there large gaps in the emails available for
6 relevant custodians for the relevant period. We didn't get any
7 answers, unfortunately, to those letters.

8 We did make it part of our 30(b)(6) notice, which is
9 why it comes up in this context now. One of the topics in our
10 30(b)(6) notice, topic 1, was about the systematic deletion of
11 potentially relevant documents pursuant to this protocol. The
12 plaintiffs did produce a witness, on July 20th I believe, to
13 testify with respect to topics 1, 2, 10 and 11 in the notice,
14 all of which are document retention topics. His name was Rick
15 Keogh. Mr. Keogh was not able to tell us anything about what
16 custodians proposed either by the plaintiff or by the
17 defendants had electronic documents remaining.

18 We showed him the list of custodians that were
19 proposed by the plaintiff at that point. We showed him some
20 lists. We asked him, do you know what's available from any of
21 the plaintiffs? He said no. The plaintiffs have taken the
22 position that that is beyond the scope of the notice.

23 It is certainly not beyond the scope of the notice as
24 it was originally framed by us. We also don't think it is
25 beyond the scope of the notice as they agreed to produce the

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1 witness Mr. Keogh to testify about document retention policies
2 and practices, quote, as they applied to the groups and
3 individuals responsible for the securitizations.

4 It certainly wasn't a surprise to the plaintiff that
5 we were keenly interested in this, because we had written to
6 them, we had written to the Court, and they said they were
7 going to provide this information. But Mr. Keogh couldn't
8 provide that.

9 The other thing that troubled us, and still troubles
10 us, and why I think we need to get to the bottom of this, is
11 the description of this automatic deletion protocol has changed
12 over time. The plaintiff, through counsel originally,
13 represented what I just described, referring to January 4th of
14 2008. Mr. Keogh submitted a declaration, which I cited in one
15 of my letters, which was referenced in the letter to the Court,
16 in another federal action where he said that documents prior to
17 October 2007 had been automatically deleted, but then in
18 October 2007 they ceased the recycling of backup tapes.

19 Then, at his deposition Mr. Keogh said and plaintiff
20 produced some information saying, hold on a second, we have
21 lots of backup tapes for emails prior to October 2007, which
22 was directly contrary to what it said in Mr. Keogh's
23 declaration in this other federal action. We followed up with
24 some more correspondence. We asked some more questions.

25 In their letter to the Court yesterday, the plaintiff

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1 told you that, quote, "FHFA has advised defendants that each
2 agreed Freddie Mac custodian has significant amounts of
3 electronic information, including email, for the relevant
4 period." They advised us at the same time they sent the letter
5 to your Honor. We got a separate letter that included the same
6 statement.

7 Respectfully, I don't think that that statement, given
8 what we know or have heard about the Freddie Mac auto deletion
9 policy, really answers the question of whether there are large
10 gaps in the emails that were apparently subject to some type of
11 auto deletion policy.

12 We don't know what are on the backup tapes that Mr.
13 Keogh identified for the first time at his deposition. If
14 there are substantial emails from custodians, I don't know
15 exactly what that means. For instance, if somebody worked on
16 deals in 2005 and I have emails for 2007, that's not going to
17 help us very much.

18 They have only identified that there are substantial
19 emails for the initial custodians they agreed to. They had
20 initially agreed to, I think, 38 Freddie Mac custodians. They
21 say they are going to add more. I think it will bring them up
22 to like 51. They say that should ameliorate our concerns. But
23 we don't know if any of those extra custodians have any emails,
24 so it doesn't really ameliorate the concerns.

25 I don't think we can wait until the end of the

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1 discovery period to find out, oh, these custodians had large
2 gaps in their emails. That's why we have been asking and why
3 we have asked the Court to instruct plaintiff to give us more
4 specific information about which custodians have emails for
5 which relevant periods and to identify whether there are
6 significant gaps. If the plaintiffs need more time to do that,
7 that's one thing, but not responding to the letters and
8 narrowly construing the deposition notices is not the way to
9 go.

10 THE COURT: With respect to your request, these are
11 topics 2 and 3, am I right?

12 MR. WOLL: It's actually 1 and 2 primarily, your
13 Honor.

14 THE COURT: I'm sorry. 1 and 2 primarily?

15 MR. WOLL: Yes.

16 THE COURT: Yes. 3 we just dealt with.

17 MR. WOLL: Right.

18 THE COURT: If I remember correctly, the plaintiff
19 principally responded that topics 1 and 2 didn't require the
20 employee-by-employee description that you are suggesting that
21 you would like now.

22 MR. WOLL: That is the position they took, your Honor,
23 yes.

24 THE COURT: Reading topics 1 and 2, I must agree. So,
25 I don't find that the 30(b)(6) witness who was prepared to

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1 answer topics 1 and 2 would have been inadequately prepared
2 because they were not able to answer information about a
3 specific individual.

4 I would like Mr. Woll to handle this issue this way,
5 which is you will get your document production for the
6 custodians. The plaintiff has represented and I have received
7 today a letter to you of July 30th that they are searching
8 backup tapes, that substantial amounts of email covering
9 relevant dates are being produced, etc. I don't know if the
10 production is going to satisfy you or not, but you will get a
11 production. If it doesn't satisfy you, please meet and confer
12 with plaintiff's counsel and, if necessary, come back to me.

13 MR. WOLL: Very good, your Honor. Given the timing of
14 things, I thought it was important to raise this issue, since
15 by the time we get the documents and identify the gaps, it
16 might be September 30th. I appreciate your Honor's
17 consideration.

18 THE COURT: Thank you, Mr. Woll.

19 Ms. Shane, a quick report. How is predictive coding
20 going?

21 MS. SHANE: Your Honor, we are working very hard at
22 predictive coding, as your Honor directed. We meet every day
23 with the plaintiff to have a status report, get input, and do
24 the best we can to integrate that input. It isn't always easy,
25 not just to carry out those functions but to work with the

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1 plaintiff. The suggestions we have had so far have been
2 unworkable and by and large would have swamped the project from
3 the outset and each day that a new suggestion gets made. But
4 we do our best to explain that and keep moving forward.

5 We very much appreciate that your Honor has offered to
6 make herself available, and we would not be surprised if we
7 need to come to you with a dispute that hasn't been resolved by
8 moving forward or that seems sufficiently serious to put the
9 project at risk. But that has not happened yet and we hope it
10 will not.

11 THE COURT: Are you still on schedule?

12 MS. SHANE: We are basically on schedule, yes.

13 THE COURT: Thank you very much, Ms. Shane.

14 MS. CHUNG: Your Honor, may we address predictive
15 coding for just a second? We agree that the parties have been
16 working together very diligently. There have been a series of
17 meet-and-confers. One issue in terms of the benchmarks that
18 your Honor knows, we did resolve a major issue, which was the
19 layering of the predictive coding on top of search terms.
20 There was agreement over the weekend that the predictive coding
21 would be applied to the entire universe of documents. That is
22 very helpful and very useful to us. As you know, that was one
23 of our major objections.

24 We do feel that we are working toward the deadline
25 that your Honor has set to report to the Court. We agree that

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1 there are issues that may require your Honor's attention. One
2 that has come up, and if another time is better, we can raise
3 it separately. It has to do with the training of the coding.
4 There is the seed set that your Honor referred to in
5 conference. That is the set of documents against which we try
6 to run the coding.

7 There is something called the enrichment set, which is
8 a set of documents that you put in to help train, to help do
9 the training. Typically, in the enrichment set you would
10 include documents that you know are relevant.

11 One issue that we have discussed with defendants is
12 there have been requests from our side, document requests, for
13 deposition testimony and written statements that have been
14 given in other RMBS cases and also to governmental agencies or
15 inquiries or to Senate subcommittees where there have been
16 prior investigations of the defendants' RMBS origination
17 practices or their checking that loans were being originated in
18 accordance with underwriting guidelines. This required culling
19 of the complaints, your Honor.

20 You know that there are references to complaints in
21 other litigations and also to the FCIC inquiries. It is the
22 type of issues that are plainly relevant, such as whether the
23 defendants were waiving into loan pools loans they had been put
24 on notice were not in compliance with the underwriting
25 guidelines. One of the things that we requested to be included

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1 in this enrichment set are such documents.

2 THE COURT: What do you mean? The depositions?

3 MS. CHUNG: It wouldn't be everything, your Honor, but
4 yes, documents that are depositions or written statements.

5 These are within the scope of documents requests that we made
6 that are from these other investigations or suits. They
7 haven't been produced to us, so we don't know what they are.

8 THE COURT: Why would a document custodian and a bank
9 have a copy of a deposition?

10 MS. CHUNG: Your Honor, these are, for example, in the
11 case of the FCIC, some of the defendants here have turned over
12 information to the financial commission, including giving
13 witness statements, on topics that are about practices that are
14 at issue in these cases.

15 THE COURT: You have some affidavits from potential
16 document custodians or declarations?

17 MS. CHUNG: We would expect there to be deposition
18 testimony. There were interviews done by some of these
19 committees. In the case of the FCIC, they did take I think it
20 was testimony. I think it was sworn testimony.

21 Now what we have been informed by the defense is they
22 consider these documents just not relevant. It is not even
23 really an issue about predictive coding. We would agree with
24 them that if the documents aren't relevant, there is no point
25 in using the documents in the enrichment set. But we have a

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1 dispute about what is relevant in terms of the scope of
2 documents that are relevant to the case.

3 I can stop there, your Honor, and we can raise it
4 separately. But you can see why, in terms of all the
5 justifications that Ms. Shane gave on the conference call we
6 had with your Honor last Tuesday, if we are going to train the
7 system up right, we need to have the right things in the seed
8 set and in the enrichment set. So there may be these kinds of
9 issues that arise.

10 THE COURT: Good. We will put those over for another
11 day. I'm learning about predictive coding as we go. But a
12 layperson's expectation, which may be very wrong, would be that
13 you should train your algorithm from the kinds of relevant
14 documents that you might actually uncover in a search. Maybe
15 that's wrong and you will all educate me at some other time.

16 I expect, Ms. Shane, if a deposition was just shot out
17 of this e-discovery search, you would produce it. Am I right?

18 MS. SHANE: Absolutely, your Honor. But your instinct
19 that what they are trying to train the system with are the
20 kinds of documents that would be found within the custodian
21 files as opposed to a batch of alien documents that will only
22 confuse the computer is exactly right.

23 THE COURT: Good.

24 MS. SHANE: You will get confirmation but not any
25 further education on that score.

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1 THE COURT: Here I'm hoping for a great report from
2 Ally.

3 MR. GOEKE: Reginald Goeke from Mayer Brown. From our
4 perspective, I think things are on track. As we indicated, we
5 gave our responses and objections to the 30(b)(6) notice to the
6 FHFA on Monday. We had a meet-and-confer with them. We
7 believe that we are currently going down the process. We are
8 going to provide them with a witness on the 9th to answer most
9 of the questions that they have identified in their 30(b)(6)
10 notice.

11 I don't know whether there are any other issues from
12 the defense side.

13 MS. LEUNG: Thank you. For the record, Kanchan Leung.
14 There is one issue that we would like to move on today. It
15 became apparent from our meet-and-confer session yesterday that
16 the overarching dispute between the parties right now is
17 whether Ally has produced a witness that will be knowledgeable,
18 will have information that is reasonably available to it from
19 the debtors. We think that they should be preparing their
20 witness and should put up a witness knowledgeable about the
21 documents in the possession of the debtors.

22 We are concerned that we are going to go down this
23 road, get a deposition, and at the end of the day still not
24 know whether documents are in the possession of the debtors.
25 This is putting aside the issue of control. Ally seems to be

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1 taking the position that they don't need to educate their
2 witness outside the four corners of Ally. We don't think that
3 that is defensible.

4 The rule contemplates for 30(b)(6) that the witness be
5 educated not just from within the company but possibly from
6 documents, from former employees, and we think from the
7 subsidiaries. They have a corporate relationship, their ResCap
8 is a domestic subsidiary; they have a contractual relationship.
9 I won't belabor the shared services agreement. And Ally
10 continues to provide great financial support for the debtors in
11 bankruptcy.

12 We think as a practical matter that information is
13 available from the debtors and that they should be informing
14 the witness with that information. It is our concern that at
15 the end of the day we are going to go through the deposition
16 process, it's not going to really advance this case any
17 further.

18 THE COURT: When you say reasonably available from the
19 debtors, you mean in preparation for this deposition you would
20 like the 30(b)(6) witness to speak with representatives of the
21 debtor to inform themselves about the debtor's knowledge on
22 these issues?

23 MS. LEUNG: Correct.

24 THE COURT: Do you oppose that?

25 MR. GOEKE: Yes, your Honor.

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1 THE COURT: Your application is granted. In the best
2 of all possible worlds, that would happen, but these companies
3 are now in bankruptcy. While the bankruptcy court may
4 certainly order their participation in discovery even though
5 there is a stay of litigation, I don't want in the first
6 instance to require that. I think any application should go
7 before the bankruptcy court. But I don't think it is necessary
8 for this 30(b)(6) witness, and I think the deposition should go
9 forward. Thank you.

10 Is there anything else that we need to put on today's
11 agenda?

12 MR. BENNETT: Your Honor, going back on one point very
13 briefly, I appreciate your Honor's comments about the
14 seminality of section 11 to the plaintiffs going forward.
15 There are six sections under which punitive damages have been
16 claimed.

17 THE COURT: I looked at that.

18 MR. BENNETT: We ask permission for your Honor to
19 brief the justifiable reliance issue we put briefly in our
20 letter. We think if the fraud claims go forward, we need to be
21 able to address documents supporting or attacking justifiable
22 reliance. Otherwise, the claims will be vastly overvalued by
23 the plaintiffs.

24 THE COURT: I absolutely agree that the punitive
25 damage claim is very important for my consideration and for

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1 everyone's consideration when they are facing that claim. I'm
2 going to ask for your indulgence and trust me that I have
3 looked at that issue and noted in how many of the cases it
4 occurs. I'm aware of the justifiable reliance element of
5 certain claims and the way all of the defenses in paragraph 3
6 of Mr. Kasner's letter -- I guess it's a joint letter from many
7 folks.

8 MR. KASNER: Correct, your Honor.

9 THE COURT: Yes. I thought about all of those. My
10 ruling with respect to the scope of discovery, e-discovery from
11 FHFA, would not change in any way given the fact that a
12 particular defendant is facing a fraud claim.

13 MR. BENNETT: Thank you, your Honor. Should the
14 parties anticipate a written ruling capturing today's order?

15 THE COURT: We have a court reporter.

16 MR. BENNETT: Thank you, your Honor.

17 THE COURT: That is the great of great benefit to me
18 and to all of us. Ms. Chung?

19 MS. CHUNG: Your Honor, we were supposed to get back
20 to you about the idea of a late August conference. I wanted to
21 address that. This is about loan files that are in the hands
22 of third parties. We would support your Honor's original idea
23 to have such a conference. I do think it would serve a
24 purpose.

25 There is no doubt that there are jurisdictional

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1 issues, but I think if we were to put together a list of where
2 these entities are and what jurisdictions they are subject to,
3 I think we could potentially work through the jurisdictional
4 issues. It may require starting miscellaneous actions in other
5 jurisdictions, but we could do that. This has been done in
6 other RMBS cases. Sometimes you have to go to the other
7 jurisdictions to get either the files or the information that
8 gets worked into the reunderwriting. The parties could draft
9 many of these documents for your Honor if that was helpful.

10 You can see from the discussion today, and your Honor
11 has also pointed it out, we are in a situation where, as you
12 put it, both sides are reserving their rights to go back to the
13 loan files, all of them. Certainly nothing we have heard from
14 the defendants today is any concession of any agreement to do
15 anything less than that.

16 This is not where the plaintiff wanted to start, but
17 this is where we are today. Given that that is the case and
18 that the loan files threaten to become a real bottleneck for
19 the reunderwriting on both sides, we think we should at least
20 explore what the possibilities are for having this conference.

21 I also think we shouldn't assume that the parties
22 won't participate in the conference, especially if it was by
23 telephone, even if they could make jurisdictional objections.
24 I think just knowing that the Court is putting the focus on
25 these requests could be very useful in getting people to

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1 prioritize turning to the production of these loan files.

2 I agree with Ms. Shane, when you ask for these loan
3 files, it runs the gamut. Sometimes you have entities who are
4 nonparties who have already produced these loan files for
5 resecuritizations in some other litigation, so it's just a
6 matter of pressing a button. For others it is a matter of
7 going and finding the bits and pieces and putting them
8 together. But certainly it couldn't hurt for them to know that
9 the Court is focused on this issue and we have our own schedule
10 that we appear.

11 THE COURT: Would you be suggesting, Ms. Chung,
12 starting with a status report per case before me with a list of
13 the entities and jurisdictions with loan files for that case?

14 MS. CHUNG: I think so, your Honor. As your Honor
15 proposed, we could get the list together very quickly. But
16 yes, we could go on a case-by-case basis and have a status
17 report.

18 THE COURT: How long do you think you would need to do
19 that?

20 MS. CHUNG: Here I need to say I think I
21 misremembered. I misremembered what we had issued and what the
22 defendants have been issuing. I may inadvertently have taken
23 too much credit for us. I think the defendants have issued the
24 subpoenas that have gone to people who may have the loan files.
25 We may have some. Our third-party subpoenas were directed at

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1 due diligence firms and ratings agencies. So much of the
2 information is actually in their hands. I see Ms. Shane
3 standing, so maybe she could address this.

4 THE COURT: Ms. Shane.

5 MS. SHANE: Your Honor, we would welcome a status
6 conference in part to address the issue of where we stand with
7 respect to some very important third-party discovery initiative
8 which, Ms. Chung is correct, has mostly been undertaken by
9 defendants. We think that could be productive. I would
10 suggest a couple of interim steps to make it more productive,
11 including that the parties change information about what loan
12 files they have and therefore what loan files they need.

13 We would most welcome the conference to make sure we
14 are all on the same page on that and are being productive about
15 it, as well as party production issues. As several of your
16 Honor's rulings today have turned on the idea that we will be
17 seeing fruits of production undertakings and representations
18 that have been made by the plaintiff, custodian searches, and
19 production of material from people whose emails have been
20 destroyed, a number of different issues where we need to see
21 the results, we would very much welcome the opportunity to have
22 your Honor help us to make sure that we are seeing production.

23 We have so far only seen 1,000 pages produced by the
24 plaintiff. We have produced well over 800,000, excluding loan
25 files on the defense side. We are worried we are going to get

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1 whatever we get in September, when it is too late. If we could
2 broaden the agenda, take a couple of steps with the parties
3 exchanging information about nonparty subpoena status and
4 requests for loans and waivers and the like, so that we lead up
5 to a conference and can very productively give your Honor
6 status reports and get your Honor's assistance in moving
7 forward, that would be very much welcome.

8 THE COURT: Ms. Shane, do you think it's realistic for
9 me to get proposed orders for my signature and status reports,
10 let's say, a week from today, or is that too fast?

11 MS. SHANE: I think it would probably make more sense
12 to have it be ten days from today so that we might have an
13 opportunity to see some of the production that has been
14 promised, or its absence, so that we can talk to plaintiff as
15 well about when they think we will see some documents. You
16 have vacation, I believe, your Honor. If it's more convenient
17 for the Court to have it in a week than in ten days, certainly
18 we can do it in a week.

19 THE COURT: I'm talking about orders with respect to
20 production of the loan files, just that portion of the topic or
21 topics. Can you and the plaintiff and the defendants and the
22 plaintiff do what they need to do in order to understand where
23 the outstanding production issues lie within a week, or not?

24 MS. SHANE: I think that is too fast, your Honor,
25 given the enormity of the undertaking and the differences in

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1 the situations people have.

2 THE COURT: This is what I would very much appreciate.
3 I think August 9th is a Thursday. I would like by August 9th a
4 proposed order or two and status letter so that I can review
5 them and give my input and, if necessary or appropriate, sign
6 them by August 10th and get a system set up for my absence for
7 a period of time the following week where more proposed orders
8 of a similar nature and status reports might come in. Is that
9 doable, Ms. Shane?

10 MS. SHANE: Yes, your Honor.

11 THE COURT: Then we already have the date government
12 late August conference. I'll get out a scheduling order. My
13 chambers will be in touch with counsel. If we don't have
14 unmarked courtesy copies of each of the submissions, we may
15 need another set so we can get that docketed. We'll be in
16 touch with you on that.

17 Ms. Shane?

18 MS. SHANE: Your Honor, it would be very helpful if in
19 advance of the 9th the plaintiff could provide us a list of the
20 loan files that they have and where they got them from so that
21 we can together work on crossing those off the list of those we
22 still have to go after.

23 MS. CHUNG: Your Honor, we can do that. To get all
24 the loan files in one place, it's not just us, it's the
25 defendants. For some of them we have the information on

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1 whether they have loan files or whether the loan files that are
2 at issue in their cases are coming from third parties. I think
3 everyone needs to contribute to understand where all the loan
4 files are going to be coming from, what the entities are, where
5 they sit. I agree with that.

6 THE COURT: It sounds like everyone is in agreement.
7 Good.

8 MS. SHANE: Right.

9 THE COURT: Anything else we need to address? Thanks
10 so much, counsel.

11 (Adjourned)